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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1931

## No. 453

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

*vs.*

HANNAH R. TEMPLE, ADMINISTRATRIX OF THE ESTATE OF JOSEPH R. TEMPLE, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

PETITION FOR CERTIORARI FILED OCTOBER 12, 1931

CERTIORARI GRANTED NOVEMBER 30, 1931

(36,267)

(36,267)

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## IN SUPREME COURT OF SOUTH CAROLINA

HANNAH R. TEMPLE, Administratrix of the Estate of Joseph R. Temple, Deceased, Respondent,

against

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

[fol. 4]

### STATEMENT OF CASE

This case was begun by service of summons and complaint the — day of ——, 1923, the cause having originally been brought in Florence County; subsequently it was transferred to Aiken County and came on for trial before His Honor, Special Judge C. J. Ramage and a jury on the 20th of November, 1928, at Aiken, S. C., and resulted in a verdict for plaintiff of Twenty Thousand ($20,000.00) Dollars actual damages, on which judgment was entered. Notice of intention to appeal was duly served and the case is before this Court on exceptions to the rulings of the Presiding Judge.

The cause involves an action under the Federal Employers' Liability Act for alleged wrongful death of plaintiff's intestate. The answer of the defendant set up a general denial and wrongful and malicious act of a third party. Motions for non-suit and direction of verdict and ruling of these motions the appellant takes exceptions. for new trial were duly made and argued and to the over-

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### COMPLAINT

The plaintiff, complaining of the defendants, alleges:

1. That Atlantic Coast Line Railroad Company, defendant above named, was at the times hereinafter mentioned, a railroad corporation, duly chartered and organized under the laws of the State of Virginia, engaged in the business of interstate commerce and operating its trains of [fol. 5] cars in the States of Virginia, North Carolina and South Carolina, and between Florence, South Carolina, and

Augusta, Georgia, and Sumter, South Carolina, and Augusta, Georgia, and operating a railroad in the County of Florence and State of South Carolina; and that Charleston & Western Carolina Railway is a corporation duly organized and chartered under and by virtue of the laws of one of the States of the Union unknown to plaintiff, and owning lines of railway in South Carolina and Georgia, and engaged in interstate commerce.

2. That plaintiff is informed and believes that Atlantic Coast Line Railroad Company does not own the entire roadbed or track from Sumter, South Carolina, to Augusta, Georgia, but that for a distance of about twenty miles from Augusta, going toward Sumter, at or near Robbins, South Carolina, it operates its trains over the line of railroad of Charleston & Western Carolina Railway under a contract with said Charleston & Western Carolina Railway, the contents of the contract being unknown to this plaintiff, but that all train crews employed by Atlantic Coast Line Railroad Company operating trains between Florence and Sumter, South Carolina, and Augusta, Georgia, travel through with the train leaving Florence or Sumter for Augusta, and vice versa, and that any negligence of the agents, servants and employes of the defendant Charleston & Western Carolina Railway Company in the upkeep or conditioning of the railroad track or bed at the point hereinafter mentioned, is also imputable and chargeable to the defendant Atlantic Coast Line Railroad Company, when its employees suffer damage thereby.

[fol. 6] 3. That on the 20th day of May, 1921, plaintiff's intestate, Joseph R. Temple, was in the employ of the defendant Atlantic Coast Line Railroad Company as a locomotive engineer, and was the engineer on Train No. 38 from Augusta, Georgia, bound for Sumter, South Carolina, which was a passenger train for hire operated by the defendant Atlantic Coast Line Railroad Company; that when said train had proceeded on its journey for a distance of about four and one-half miles out of Augusta towards Sumter near Beach Island, in Aiken County, South Carolina, said engine overturned along with two cars attached thereto, and in the overturning of said engine and cars plaintiff's intestate received wounds in and upon his head and body from which he died then and there.

4. That late in the afternoon of May 19th, 1921, the agents, servants and employees of the Charleston & Western Carolina Railway had been working on the roadbed over which said engine was driven at the point where the same was overturned and had negligently, carelessly, wilfully and wantonly failed to properly spike and bolt one of the iron rails on which said engine and train of cars had to run and keep the same properly spiked and bolted, and that when said engine and cars came upon said rail the same did not hold in the position it should have held to support the engine and cars, but one of the rails spread, thus causing the engine on which plaintiff's intestate was riding to turn over and the resultant death of plaintiff's intestate.

5. That although the defendant Atlantic Coast Line Railroad Company was not in the actual charge of the main-[fol. 7] tenance of the said track at the place of the accident, yet it was its duty to see that its employees were furnished a safe track on which to operate its trains, the negligence and carelessness of the servants, agents and employees of the Charleston & Western Carolina Railway in the construction and maintenance of its roadbeds and tracks used by the defendant Atlantic Coast Line Railroad Company being the negligence and carelessness of the defendant Atlantic Coast Line Railroad Company.

6. That on the said 20th day of May, 1921, the defendants herein were engaged in carrying passengers and freight for hire and reward from and between the several States of the United States and were engaged in interstate commerce by railroad, and the plaintiff's intestate, Joseph R. Temple, was at the time of his aforesaid injuries and death employed in interstate commerce by the defendant Atlantic Coast Line Railroad Company; and the plaintiff, therefore, for and on behalf of the beneficiaries of the estate of its said intestate invokes the aid of all and every of the provisions of the statutes of the United States in such case made and provided.

7. That at the time of the death of the said Joseph R. Temple he was forty years of age, strong and in excellent health, of upright character, sober and industrious habits, and was earning from two hundred and twenty-five to two hundred and seventy-five dollars per month; that he left surviving him a widow, Olive V. Temple, and the following

named children, to-wit: His son, John Robert Temple, age eighteen (18), his daughter, Annie Ray Temple, age fourteen (14), and his son, Joseph Aley Temple, aged ten (10), [fol. 8] two of whom are feeble minded and all of said children being totally dependent upon him for their support; that his widow, Olive V. Temple, since the death of her late husband, Joseph R. Temple, has assigned, transferred and set over to her said children, John Robert Temple, Annie Ray Temple and Joseph Aley Temple, all her right, title and interest in and to any claim or claims she may have against the defendants in this action, and this action is, therefore, brought entirely and solely for the benefit of said minor children.

8. That by reason of the negligence and carelessness hereinbefore set forth on the part of the defendant railroad company, resulting in the death of plaintiff's intestate, John Robert Temple, Annie Ray Temple and Joseph Aley Temple, for whom this action is brought, have been greatly damaged and injured in the sum of Thirty Thousand Dollars.

Wherefore, plaintiff demands judgment against the defendant in the sum of Thirty Thousand Dollars, for the costs of this action and for such further and other relief as the Court in its wisdom may deem just and right.

Philip H. Arrowsmith, Williams, Croft & Busbee,
Plaintiff's Attorneys.

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ANSWER

The defendant, Atlantic Coast Line Railroad Company, answering the complaint herein:

1. Admits the allegations contained in paragraphs one, two and three thereof.

[fol. 9] 2. Denies the allegations contained in paragraph four thereof, except that it is admitted that one of the rails in the track at the point where the accident occurred did not hold, which this defendant alleges was caused and occasioned by the malicious act, or acts, of a person or per-

sons not in the employ of the defendant, without its knowledge, and without opportunity of discovery on their part, as hereinafter more particularly described.

3. With reference to paragraph five thereof this defendant alleges that the matters therein mentioned are matters of law for the determination of the Court.

4. Admits the allegations of paragraph six thereof.

5. Has not knowledge nor information sufficient to form a belief as to the truth of the allegations contained in paragraph seven thereof, and, therefore, denies the same except as to the earning capacity of the said Joseph R. Temple at the time of his death, which allegation is admitted.

6. Denies the allegations contained in paragraph eight thereof.

Further answering the complaint and by way of affirmative defense, this defendant alleges:

1. That the accident and derailment in which the said Joseph R. Temple met his death at or near Beach Island, South Carolina, on or about the 20th day of May, 1921, was due and occasioned solely by reason of the malicious act, or acts, of some person or persons not in the employ of the defendant, in that such person or persons, without the knowledge or consent of the defendant, in the night time removed the bolts, spikes and fastenings from a rail in the [fol. 10] track of the defendant, Charleston & Western Carolina Railway Company, at the point where the accident occurred and when the train reached and went up said rail, thus loosened and made insecure, the engine was derailed, turned over down the embankment at said place and the said Joseph R. Temple was killed; that the defendants had no opportunity of observing the rail after the bolts had been removed and the spikes withdrawn; that due diligence and care was exercised in the maintenance of the said track, which was safe and secure except for such malicious tampering with the same, and that investigation instituted by defendants led to the arrest of one George Rivers and his conviction for the wrecking of the train on the date in question, in the manner mentioned.

**Wherefore this defendant prays that the complaint be dismissed at the cost of the plaintiff.**

**F. L. Willcox, A. L. Hardee, Attorneys for Defendant.**

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IN COURT OF COMMON PLEAS OF AIKEN COUNTY

## Statement of Evidence

TESTIMONY FOR PLAINTIFF

This case was tried at Aiken, South Carolina, at the regular November Term, 1928, Court of Common Pleas for Aiken County, the same being tried before His Honor, Special Judge C. J. Ramage, and a jury, and the said trial beginning on November 20th, 1928.

AGREEMENT RE TESTIMONY OF MRS. HANNAH R. TEMPLE

[fol. 11] Mr. Arrowsmith: If the Court please, Mrs. Hannah R. Temple, the other of the deceased, and the Administratrix of the estate, who is the substituted plaintiff in this action, not knowing that the case was to be called for trial, has gone out of the State into New York, I believe, on a visit to relatives, and counsel for the defendant have agreed that if she were present she would testify to the statement that I am now about to read.

NOTE.—Mr. Arrowsmith thereupon read to the jury, and into the record, the following statement:

"Mrs. Hannah R. Temple, if present, would testify as follows:

"I am 74 years of age and the mother of Joseph R. Temple, who was killed on the 20th day of May, 1921, while serving as engineer, driving the engine drawing the train from Augusta, Ga., to Florence, S. C., which was due to leave Augusta at 2:40 A. M.

"My son had been in the railroad service — years, and was an engineer for twenty years. At the time of his death he was 47 years old and was earning approximately $225.00 per month. The condition of his health was good and, so far as I know, he was suffering from no constitutional or functional troubles of any kind.

"He was married and the father of three children, who, at the time of his death, were the following ages: Annie Ray, 9; Joe Abney, 11; John Robert, 13.

"Because of improper conduct on the part of his wife, he had separated from her before his death. I kept house and maintained the home for my son and his children. Of these children, two are feeble-minded, and one of them is deformed.

[fol. 12] "At the time of my son's death he left a very small estate, of the value of not more than $5,000.00. Since his death I have had the full responsibility of the children. I am the qualified and acting administratrix of his estate and the qualified guardian of his children. I have been substituted as plaintiff in this action and bring the same for the benefit of his dependents."

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[fol. 13] W. A. Dobson, a witness for the plaintiff, was called, sworn, and testified as follows:

Direct examination.

By Mr. Williams:

Q. I believe you were summoned by both sides?

A. Yes, sir.

Q. In order that the jury may know where you stay,—you are a merchant and farmer?

A. Yes, sir.

Q. Where is your place of business?

A. Beech Island.

Q. Your store is the brick store?

A. Yes, sir.

Q. The corner store?

A. Yes, sir.

Q. That is how far from the scene of the wreck in 1921?

A. About a mile and a half.

Q. That train that was wrecked passed the point at your place what time in the morning?

A. I ran a gravel bed about the wreck there, and it would pass before I got there.

Q. Will you now describe about how far from Beech Island Station this wreck occurred, and whether on the Augusta end or the Ellenton end?

A. On the Augusta end of the Beech Island Station.

Q. And how far from the crossing was this wreck?

A. I think some of the cars were on the crossing and standing there when I got there.

Q. What time did you get there?

A. About 6:30 in the morning.

Q. When y. u got there, what condition was the train?

A. The engine and tender and two coaches were off. The [fol. 14] engine was off in the swamp.

Q. On the right hand side as you go to Ellenton?

A. Yes, sir.

Q. What was the condition of the engine as to fire?

A. Everything had burned that could burn.

Q. Did you know Engineer Temples?

A. No, sir.

Q. He had already been removed?

A. Yes, sir, he had.

Q. Did you see anything about the rails or ties as to where the spikes were?

A. I saw that the rail was all torn up.

Q. Did you see any spikes?

A. Yes, sir, and bolts too.

Q. Where were they laying?

A. Where the track was loose.

Q. Laying on the cross ties?

A. Yes, sir.

Q. Where was that?

A. Three or four ties were taken loose.

Q. The three or four ties that were taken loose were on the Augusta end of the rail?

A. No, sir, I think the flanges or angle plates were on the Augusta end of the rail.

Q. What you call the angle plate,—is what?

A. It has six bolts in it, and that is three in each end of the rail.

Q. Did you or not notice,—you testified in this case when they tried George Rivers?

A. Yes, sir.

Q. Did you notice anything about a grip about the cab?

A. Some of them pulled the binding of a grip out of there that had been burned, and picked it up and remarked, Poor old Joe, here is his grip, and he always carried it with him, [fol. 15] or something to that effect.

Q. You saw that yourself?

A. Yes, sir.

Q. Describe please what was on the end of the rail that was not in line and joined with the others?

A. Not anything.

Q. Did you notice a dent?

A. Yes, sir, there was a dent, and it looked as if it had been pushed in and you could see the dent about the center of the middle of the rail.

Q. A train going towards Augusta would not hit the rail that way?

A. No, sir, it would push it back in it looks like.

Q. But one coming from Augusta would hit it?

A. Yes, sir.

Q. Did you go back there any time during the day?

A. I was around there all day.

Q. Along later, did anybody suggest about some tools?

A. We were talking about that, and after we finished loading our gravel I walked down there and took a general look.

Q. Were those railroad men?

A. I don't know who mentioned it, but I think I mentioned it myself that it looked like it had been wrecked and there might be some tools.

Q. Did you go and look for the tools?

A. Yes, sir.

Q. You found a place where somebody had walked out?

A. Yes, sir.

Q. What did you find?

A. A crow bar that you pull spikes with and a wrench.

Q. That was where?

A. About off of the right of way of the railroad, and in a big gravel pit that had been dug out there for some [fol. 16] time. It was laying out behind some little bushes.

Q. Were you down about that road the day before?

A. Yes, sir.

Q. Did you go there often?

A. Every day except Sunday.

Q. Did you ever see the section hands working there?

A. Yes, sir, I saw them working.

Q. Do you recall how long before the wreck they worked there?

A. I don't remember their working there that week, but I think they were there about the week before.

Q. What time did you go there?

A. At 6:30 in the morning, and leave about two when they only loaded once a day, and when they loaded two times a day I was generally there all day.

Q. You saw them working there?

A. Yes, sir, and they had been doing some work for me too.

Cross-examination.

By Mr. Gyles:

Q. You are a merchant and farmer?

A. Yes, sir.

Q. At that time you had a gravel bed close by the wreck?

A. Yes, sir.

Q. And your business kept you there every day?

A. Yes, sir.

Q. Describe to the jury how you saw the rail that was out of place?

A. I think it was the end towards Ellenton had dropped down on the ties, and the balance of the rail was pushed out in the swamp for four or five rail lengths where the train ran off, and it was all down the embankment, and it [fol. 17] was smooth towards Augusta, and it looked as if it was taken loose. Spikes were holding it up to the joint, and the other part was taken loose.

Q. At the end of the rail towards Ellenton,—what was done to it?

A. It was dented by the flanges of the train, it looked like.

Q. How was that?

A. The track would have to have been taken loose and spiked in. Of course, it was not standing right in that position.

Q. Those holes where the spikes were removed,—were they torn out as if crushed by a train?

A. Yes, sir, they were torn out.

Q. From the end of the tie,—could you tell whether or not the nuts and bolts had been removed?

A. Yes, sir, they had been.

Q. They had?

A. Yes, sir, they were down on the tie.

Q. You would say that somebody had removed the bolts and angle bar?

A. Yes, sir, they had been removed certain.

Q. What part of the track were the bolts?

A. Some on both sides.

Q. Where the angle bar was removed was on the end of the rail towards Ellenton?

A. Yes, sir.

Q. And the end of the rail towards Ellenton was pulled in?

A. Yes, sir, and spiked in from the outside, and that made the track too narrow.

Q. It was pulled in and spiked?

A. Yes, sir.

Q. What would that cause if a train came from Augusta?

[fol. 18] A. It wrecked it.

Q. If that rail—the end towards Ellenton was pulled in a little bit and spiked—and a train coming along—would that make the dent on the other rail?

A. It had to be spiked in so that the wheel could hit it to make that dent.

Q. You say you were down there?

A. Yes, sir.

Q. Was any work done the day before by Mr. Leach and his hands?

A. Not that I remember. I didn't see them there the day before.

Q. Did you see them the week before?

A. I think they were there the week before, and did some work for me in the pit.

Q. If they had been there that week you would have seen them?

A. More than apt.

Q. Had not that track there been re-built some time before that and didn't need work?

A. I think it had been re-tied and it was a plum straight track.

Q. Don't you know that Mr. Leech was working up the road a mile or two?

A. No, sir, I don't know that.

Q. You just know they had not worked there that week?
A. Yes, sir.
Q. What was the character of the land at that point—is there not a hill on one side?
A. Yes, sir, a bluff on one side and a swamp on the other.
Q. Going towards Ellenton is the bluff on the right or [fol. 19] the left hand side?
A. On the left.
Q. What is on the right?
A. Swamp.
Q. How did you happen to locate the tools?
A. I was walking around and saw this path and followed it and found the tracks and the tools.
Q. How far was the tools?
A. They were right to the bluff.
Q. How far was the tools from the railroad track?
A. About as far as to the wall back there (indicating to counsel).
Q. When you got to the bluff, where was the tools—on the surface of the ground or how?
A. They were on some sluffed in dirt, but they were not on that. They were down in the bottom and at the foot of the bluff.
Q. How many feet from the track?
A. About to the wall back there.
Q. How far is that?
A. I think fifty or sixty feet away.
Q. Just what tools did you find?
A. A wrench and a pull bar.
Q. Is that bar a railroad tool or not?
A. Yes, sir, it is.
Q. Did it have any identification marks on it as to what road it belonged to?
A. Yes, sir.
Q. What road?
A. Southern.
Q. What is that bar used for?
A. Pulling spikes.
Q. Did you see or not in the cross ties the dent where spikes had been pulled?
[fol. 20] A. Yes, sir, I saw that.
Q. There is no doubt about that?
A. No, sir, they were pulled.

Q. It was not a matter of fixing the track and leaving them out?

A. No, sir, they were pulled.

Q. What else was there?

A. A wrench.

Q. Did that belong to the Southern?

A. Yes, sir.

Q. What was that used for?

A. To take the bolts loose. We tried it and it seemed that the Southern wrench was larger than the bolts, and it had a lot of play in this wrench when we tried it, and it would hold enough to get off and we tested it.

Q. It showed that wrench would do the work?

A. Yes, sir.

Q. What other tools were there?

A. That is all.

Q. What became of them?

A. I turned them over to the railroad authorities, and they were up here.

Q. Do you know whether the Southern Railway got them back or not?

A. No, sir, they promised to give them to me, but I never did get them.

Q. That wreck was how far from the river trestle?

A. I imagine between a half and three-quarters of a mile.

Q. This happened at about the four and a half mile post?

A. I think so.

Q. It is four and a quarter post?

A. Yes, sir.

[fol. 21] Q. That is four and a quarter miles from Augusta?

A. Yes, sir.

Redirect examination.

By Mr. Williams:

Q. Could you tell about how many of the spikes had been pulled?

A. I think about three ties.

Q. Cross ties?

A. Yes, sir, it seems to me that was the way.

Q. They were not pulled on both sides?

A. I think the first one was pulled on both sides, and some were in there on the outside. It pulled them on the inside where it could go in.

Q. How many of the spikes did you see there?

A. I didn't count them, but it looked like three or four.

Q. When did you find the tools?

A. About two or three in the afternoon.

Q. You always knocked off about two o'clock?

A. Yes, sir, unless we loaded twice a day.

Q. You were not loading twice a day then?

A. No, sir.

Q. How far is that place from the nearest point of the Southern Railway?

A. About five or six miles.

Q. How heavy is that crow bar?

A. It is all I wanted to tote to a little office of mine there.

Q. That place where the train was wrecked was between the crossing and Beech Island Station?

A. Yes, sir.

Q. How far from the station of Beech Island?

A. A mile and a half or two miles.

[fol. 22] Q. And was right at this gravel pit?

A. Yes, sir.

Q. A fellow toting that crow bar and wrench for five or six miles would have a good load?

A. Yes, sir, but there was two tracks, I think. It looked like there was two tracks out there.

Q. You stayed down there a good deal—do you know whether they had a track walker on the railroad?

A. No, sir, if they did I never did know it.

Q. I mean a man to walk and inspect the track?

A. No, sir, I never did know it if they did.

Recross-examination.

By Mr. Gyles:

Q. Did you attempt to track the person that wrecked the train?

A. No, sir, no further than up the bank there.

Q. I understood you to say that you saw two tracks?

A. Yes, sir.

Mr. Williams: He said two tracks where they went to where the tools were.

Witness: Yes, sir, two tracks followed them to the tools.

Mr. Gyles (continuing):

Q. Did you follow them any further?

A. You could see where two tracks went up the bank, but I didn't follow them any further. The railroad men did.

Q. What is up on the bank?

A. Woods and then field.

Q. You worked there every day?

A. Yes, sir.

[fol. 23] Redirect examination.

By Mr. Williams:

Q. You said there were two tracks?

A. Yes, sir.

Q. Had many people been there that morning?

A. Yes, sir, a big crowd.

Q. They had been walking around and looking?

A. Yes, sir.

---

C. M. RANDALL, a witness for the plaintiff, was called, sworn, and testified as follows:

Direct examination.

By Mr. Williams:

Q. I don't know whether you were here or not when I asked Mr. Dobson to describe the place—did you see the wreck that morning?

A. No, sir.

Q. You were not there?

A. No, sir.

Q. Between the crossing and Beech Island Station do you know where the gravel pit is?

A. Yes, sir.

Q. Is that gravel pit in sight of the other crossing there?

A. Yes, sir.

Q. That crossing where you cross the railroad and go into the river—what is on the right hand side of the road from Augusta to Ellenton?

A. Swamp.

Q. On the left hand side is what?

A. A kind of bluff.

Q. What had they been getting out of the bank?

[fol. 24] A. There is a gravel pit there.

Q. Where the road crosses the crossing and goes into the swamp—what is in there next to the river?

A. A hay field is in there.

Q. In 1920—did you make any arrangements for that hay field?

A. Not that same one, but another one.

Q. You had to go in there?

A. Yes, sir.

Q. You had it until when?

A. Until the spring of 1921.

Q. You remember the occasion of the wreck?

A. Yes, sir.

Q. But not the day?

A. No, sir, I don't know the day.

Q. When you heard of the wreck—that was the next day?

A. Yes, sir.

Q. Did you have anything to fix in your mind the afternoon before?

A. Yes, sir.

Q. What had you seen?

A. Some section hands working up the railroad.

Q. What time was it?

A. About four or five I guess.

Q. What did they appear to be doing?

A. Working like fixing a rail. I didn't pay much attention. I had seen them so much.

Q. You had been crossing how often?

A. About a year.

Cross-examination.

By Mr. Gyles:

Q. Do you know what year that was?

[fol. 25] A. 1921.

Q. Do you know what month it was?

A. It seems like May.

Q. Were you working down there then?

A. No, sir, I was getting my tools and hay out, and I worked the swamp in 1920.

Q. You went back to get your things?

A. Yes, sir, I was there all along in the spring getting my hay out, and I was going back and forth for about a year.

Q. You heard about the wreck?

A. Yes, sir.

Q. You didn't go to the wreck?

A. No, sir.

Q. You didn't go—the day of the wreck, you didn't go?

A. No, sir.

Q. Or the day afterwards?

A. No, sir.

Q. You never did go to the wreck?

A. I never did.

Q. You don't know anything about the wreck at all?

A. No, sir, I remember there was a wreck and I know I was there the day before.

Q. How did you hear that?

A. I heard of the wreck, and I know I was there the day before.

Q. Where were you when you heard of the wreck?

A. I could not tell you.

Q. You have no idea?

A. I don't remember, it has been so long.

Q. But you remembered hearing of the wreck?

A. Yes, sir.

Q. And on one of the trips in there you had seen people working on the railroad?

[fol. 26] A. Yes, sir, very often.

Q. Would you swear that the day before the wreck men were working there?

A. Yes, sir, as I was coming out I saw some men working there about Beech Island crossing, and between there and the sand pit.

Q. Is that Beech Island station?

A. Yes, sir.

Q. That is the crossing you are talking about?

A. Yes, sir, and the one up about the sand pit.

Q. There are several pits there?

A. Only one.
Q. Whose is that?
A. Mr. Dobson's.
Q. You saw them working where?
A. Between Beech Island station and the sand pit away up the road.
Q. You would not pretend to say where?
A. No, sir, I just saw them.
Q. You just crossed the railroad?
A. Yes, sir.
Q. Driving what?
A. A wagon.
Q. Where did you cross?
A. Beech Island Station.
Q. That is where you crossed—at Beech Island station?
A. Yes, sir.
Q. You say you crossed at Beech Island station and looked up the road and saw some hands working on the railroad?
A. Yes, sir.
Q. And where they were working you don't know?
A. That is all.
[fol. 27] Q. And except for that—you don't know anything about the case?
A. No, sir, only I just saw them working.

Redirect examination.

By Mr. Williams:

Q. Where they were working was in the vicinity of the sand pit?
A. Yes sir.

Mr. McKay: I object, as my friend is leading the witness.

Mr. Williams (continuing):

Q. Mr. Gyles' railroad didn't object to your being there to find the fellows that robbed the Express Company out of fifty thousand dollars?
A. No, sir.
Q. You identified the fellows?
A. Yes, sir.

Mr. Gyles: We object now, as that has nothing to do with the case.

The Court: No, sir, I don't think you had better go into that.

Plaintiff rests.

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MOTION FOR NONSUIT

Mr. McKay: We would like to make a motion, and ask that your Honor please excuse the jury.

The Court: All right, gentlemen of the jury, you may retire to your room.

(Jury retires to the jury room.)

Mr. McKay: May it please the Court, the defendant asks for a non-suit at this stage of the case on the ground that there has been insufficient evidence of actionable negligence [fol. 28] to warrant the submission of the issues made by the pleadings to the jury. I will not make the usual ground also of absence of wilfulness, because this being a cause brought under the Federal Employers' Liability Act, the question of punitive damages based upon wilfulness is not in this case; and we ask you to address your attention to the evidence, keeping in mind that this is a cause of action brought under the Federal Statute, and that there devolves upon the plaintiff in the case to show that the death of plaintiff's intestate was the negligence of the defendant. There are no presumptions that arise, but there is a straight issue of a sufficient evidence to make out a prima facie case.

(The above motion was thereupon argued to the Court by Mr. McKay, after which the Court announced as follows:

The Court: I think there is enough to go to the jury. I suppose you will make a motion for a directed verdict at the end, but I had rather pass on the whole thing. I think there is enough to go to the jury. Outside of direct testimony, you can, as I understand, prove negligence by circumstances, and without giving my opinion about the matter one way or the other, I simply hold that there is enough to go to the jury.

J. H. LEACH, a witness for the defendant, was called, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. How old are you?

A. Going in my sixty-seventh year.

[fol. 29] Q. How long were you in the railroad business?

A. Thirty-seven years.

Q. In 1921, during the first of the year—at least from January to June—were you in the railroad business?

A. Yes, sir, working for the Charleston & Western Carolina Railway Company.

Q. What was your position?

A. Section foreman.

Q. What part of the track did you have charge of?

A. From the three mile post to the eleventh.

Q. With relation to the Savannah River—where is the three mile post?

A. Just beyond the Savannah River on the Georgia side.

Q. How far did that go on the South Carolina side?

A. About ten and three-quarters from the river, and to the eleven mile post..

Q. Did that section cover the place of the wreck?

A. Yes, sir, and the wreck occurred about a mile and a quarter from the end of my section on the Savannah River.

Q. And about what mile post?

A. The four and a quarter mile post.

Q. Had you worked that place with your hands any time before?

A. No, sir, it had been sixty days.

Q. What is that paper?

A. Weekly work report.

Q. Read it?

A. You read it.

Q. I will read it then——

Mr. Arrowsmith: I cannot see the relevancy of that document.

Mr. Gyles: I am going to undertake to show that that [fol. 30] track was re-built commencing sixty days before, and going towards Ellenton, and show what work was done

and when it was done by the man who did it, and his daily report.

Mr. Arrowsmith: The witness I think can testify to the relative facts, but I don't see how the paper itself can shed any light on the inquiry.

Mr. Gyles: It is signed by the man who did the work, and it shows where he worked, and how many men he worked, and at what mile post.

The Court: I will let it go in for what it is worth.

Mr. Gyles (continuing):

Q. What do these weekly reports show?

A. The number of ties used during the week and number of repairs and dates and place.

Q. And the place you worked?

A. Yes, sir, between such and such a mile post.

Q. This record would show where you worked and how you worked according to the dates on the sheets?

A. Yes, sir.

Q. The first sheet I see here is April 2nd,—what does it show?

A. That shows the date and that is my signature down there.

Q. That shows where you were working then?

A. Yes, sir.

Mr. Gyles: We offer this and all the reports in evidence signed by him as competent to show when the work was done, and where it was done as outlined in the reports.

Mr. Arrowsmith: We simply desire to note our objection.

(The file containing the reports referred to by counsel and the witness was offered in evidence, and the same was [fol. 31] marked by the stenographer as Exhibit No. 1, in this case).

(Mr. Gyles then reads Report No. 1, which is the report for the week ending April 2nd, 1921).

Mr. Gyles (continuing):

Q. That is the four and a quarter mile post?

A. Yes, sir.

Q. And it is between the four and five mile post that the wreck occurred?

A. Yes, sir.

Q. That is your signature there (indicating to the witness)?

A. Yes, sir, and that was putting in ties where they were rotting and at the joints.

Q. You remember working the track or road bed the week ending April 2nd, as this report shows?

A. Yes, sir.

Q. Did you do the work as represented by this day sheet or report here?

A. Yes, sir, I did.

Q. Did you put that track in good condition there?

A. Certainly.

Q. Now, as to this report which I show you——

Mr. Arrowsmith: We make the same objection. It is self-made and self-serving.

The Court: Let it in.

Mr. Gyles (continuing):

Q. This covers the report for May 21st?

A. Yes, sir, ending there.

Q. The wreck occurred when?

A. On the morning of the 20th.

Q. This is between the six and seven mile post.

A. Yes, sir.

Q. How far from Dobson's pit?

[fol. 32] A. Two and a half to two and three-quarter miles from Beech Island station.

Q. Is there not quite a curve in the railroad between those points?

A. Yes, sir, there is.

Q. It was around that curve between the sixth and seventh mile post- that you were working then?

A. Yes, sir.

Q. You worked there on the 19th of May?

A. Yes, sir.

Q. Then you worked on the 20th?

A. Clearing the wreck.

Q. Now, according to that report,—if you worked between the four and five mile post- April 2nd, and were working on the 19th and 20th between the six and seven mile posts,—it would be about two months since you had worked there?

A. Yes, sir, about sixty days. I made about a mile a month.

Q. In putting in ties, does it or not depend on the number of men you have as to how fast you can work?

A. Yes, sir.

Q. And with the number of men you had you worked about a mile a month?

A. Yes, sir.

Q. Did you at all during the week of the wreck do any work on the track where the wreck occurred or near it?

A. No, sir, not within a mile and a half of it.

Q. Was there anything wrong with the track on May 19th or on the morning of the 20th?

A. Not anything.

Q. Was that track in good condition?

A. Yes, sir, it was newly timbered and newly surfaced. [fol. 33] It was as good as any track on the C. & W. C. Railroad.

Q. Did you often see that place?

A. Yes, sir, I would pass there one or two times a week going to Augusta for material and all.

Q. But you and your men had done no work at that point within sixty days?

A. Just about that time.

Q. Where do you keep your tools?

A. In the tool house locked up. That is the instructions of the company.

Q. On the 19th or 20th, did you miss any tools?

A. No, sir, I have no tools branded with the Southern brand.

Q. You had not missed any of your tools?

A. No, sir.

Q. None of the tool boxes had been broken?

A. No, sir.

Q. Did you see the tools that were found?

A. Mr. Dobson called my attention to it. He found them in my sight. He walked off and tracked the tracks.

Q. How far were they away from the track?

A. About one hundred feet.

Q. Whose tools were those?

A. They had the Southern brand on them.

Q. Those tools that you saw there didn't come from your railroad?

A. No, sir.
Q. Was any other crew working on that section there?
A. No, sir.
Q. You had charge of that entire section?
A. Yes, sir, I did.
Q. And there was no other crew there?
A. No, sir, and I did most of the repair for Mr. Dobson.
[fol. 34] Q. Could any one crossing the railroad track at the Beech Island station crossing see as far down the railroad track as where this wreck occurred?
A. He would have to have crooked eyes as there is a stiff curve in there.
Q. He could not see as far as this place?
A. No, sir, it is a very abrupt curve in there.
Q. How far is it?
A. A mile and a half or three-quarters from the crossing.

Cross-examination.

By Mr. Arrowsmith:

Q. You were thirty-seven years with the railroad?
A. Yes, sir.
Q. What roads?
A. The Atlantic Coast Line, the L. & N. Railroad, the Georgia Railroad, and with the C. & W. C. Railway Company.
Q. How long were you with the C. & W. C. Railway Company when this wreck occurred?
A. From February 1st until May 20th when the wreck occurred.
Q. You were a new comer on that section?
A. Yes, sir.
Q. How long did you remain after the wreck?
A. About a year and a half.
Q. Where did you go then?
A. Quit for awhile, and then worked for them again.
Q. What are you doing now?
A. Fishing and trapping and retired now.
Q. Where is the four and a quarter mile post to Ellenton station?
A. I don't remember the distance.

Q. What is the color of the four and a quarter mile post [fol. 35] that you refer to?

A. White.

Q. What is the color of the four and a half mile post?

A. None is there.

Q. What is the color of the four and three-quarter mile post?

A. No post is there. They only put a post at the mile.

Q. When you say four and a quarter mile post, you mean an obstacle or physical object?

A. That is the way it is expressed in railroading.

Q. That is not very accurate?

A. They generally have a measurement.

Q. There is no four and a quarter mile post is there—if there is not such a post, it would be stating a fact which did not exist?

A. I suppose so.

Q. Now, it had been sixty days, I believe you said, since you had done any work at or about where the wreck is said to have occurred?

A. Yes, sir.

Q. And no one else as far as you know had done any work at that place or about there during that period?

A. No, sir.

Q. Or between Beech Island and the place of the wreck?

A. Not that I know of.

Q. For sixty days no work had been done in there?

A. No, sir.

Q. Do they have a track inspector?

A. Each gang has a track walker if they think it needs looking after.

Q. You mean they take over a hand and send him?

A. Yes, sir, sometimes.

Q. And in sixty days you had not done that?

A. What?

[fol. 36] Q. Sent a track walker to inspect that track.

A. Yes, sir, I had been over it a dozen times.

Q. You sent no track walker?

A. I have no special track walker, but I don't remember whether I sent one that day or the day before or when.

Q. You cannot say you did?

A. No, sir.

Q. You go and come from Augusta once a week?

A. When we need material I go to the store room and get it.

Q. Where is that?

A. In Augusta.

Q. How do you go?

A. On a motor car.

Q. That is not a very careful inspection.

A. I suppose so, as the General Superintendent makes them that way.

Q. Do you think a careful inspection could be made of a track in that way?

A. Yes, sir.

Q. What rate of speed did the motor cars go?

A. They can go at any speed you want them. Around twenty or twenty-five miles an hour.

Q. At what rate did you go?

A. Ten or twelve miles an hour.

Q. I believe you said you recalled this work independently of the record,—that is the work as called for on the sheets?

A. You mean I repaired the wreck.

Q. The work that was done on the track in your section between April 2nd and May 21st,—you would not need these papers to refresh your recollection because you independently remember doing the work?

[fol. 37] A. Yes, sir, during that period. I generally made a note every night on the note book and made out the report on Saturday and turned it in

Q. Do I understand that this is not the original entry of the work you did?

A. I put it on the day record.

Q. This is a result then of the transcript from your daily record?

A. That goes to the Road Master.

Q. That information does not come out of your head?

A. No, sir, I put it in a note book.

Q. And at the end of the week you take out from the note book and put it on here (indicating the report sheet to the witness)?

A. Yes, sir.

Q. Was there any particular reason why your report of May 21st should differ then from your report of April 2nd?

A. What do you mean?

Q. Under the head of "Remarks,"—I find three words on April 2nd, and on May 21st it is full?

A. That depends on the work done.

Q. On the 16th, I see you use four and a half men?

A. One worked a half a day.

Q. That is another railroad inaccuracy or expression?

A. Yes, sir.

Q. When is the last time you had been to Augusta before the wreck?

A. I could not say.

Q. A week or ten days?

A. No, sir, some time during the week, I guess.

Q. Have you not a record to show when you went to Augusta the last time before the wreck?

A. No, sir.

[fol. 38] Q. How long would you guess it had been?

A. Monday or Tuesday.

Q. What day was the wreck?

A. Friday morning. I go to Augusta one or two times a week after spikes and material and bolts and things like that.

Q. Yet you testified that the track was in perfect condition on the day of the wreck?

A. Yes, sir.

Q. How can you — that if you had not been over it since Monday?

A. It was newly timbered and bolted up.

Q. That is your reason?

A. Yes, sir.

Q. That is an opinion?

A. Yes, sir, but you don't have to inspect a new track every day.

Q. What time did the wreck occur, if you know?

A. If it was on time, it was between three and four o'clock in the morning.

Q. Would you say that the train was on time?

A. I don't know. I was asleep in bed.

Q. You don't know that?

A. No, sir.

Q. How far were you sleeping from the place of the wreck?

A. Three and a half miles.

Q. You stay at the three and a half mile post?

A. No, sir, at the seven and a half mile post.

Q. You got word and come down there?

A. Yes, sir.

Q. What time was Mr. Dobson there?

A. I didn't pay any attention.

Q. I understood you to say that he called your attention [fol. 39] to the tracks and tools?

A. Oh, that was a day or two afterwards.

Q. It was?

A. Yes, sir, it was the second day afterwards, I think, that those tools were found.

Q. Now, about those tools that were found the second day after the wreck,—one was a crow bar?

A. Yes, sir, or a spike bar.

Q. It is just a long iron bar with a claw on the end of it, I believe?

A. Yes, sir.

Q. What length would you say?

A. Four and a half or five feet. It is generally about five feet long.

Q. About what would it weigh?

A. Between twenty and thirty pounds.

Q. How many hands work with one of those bars?

A. One.

Q. It is made heavy?

A. There is difference in the weight of them.

Q. What about this particular one?

A. It weighed sixteen or eighteen pounds, I guess.

Q. This is a small one?

A. There is different sizes.

Q. Were the nuts and bolts there still two days after the wreck?

A. No, sir, they might have been buried there somewhere, as we had made repairs, but the morning of the wreck they were laying at the joint on the inside of the rail there.

Q. A train going towards Augusta, would have held the rail in line?

A. No, sir, if it was spiked in too much the pony truck would have demounted the rail.

[fol. 40] Q. Therefore, in putting this rail in place you had it in line?

A. Yes, sir.

Q. Did not trains go to Augusta on the night of the wreck?

A. Yes, sir.

Q. You heard them pass?

A. Yes, sir.

Q. Therefore, you had that track in sufficient alignment so as not to throw the pony truck off of the rail going to Augusta?

A. Yes, sir.

Q. But you did not have it in sufficient line to keep the pony truck on coming from Augusta?

A. Yes, sir, but is was tampered with.

Q. You had not seen it since Monday?

A. I don't know. I had seen it during the week. I don't know what day now.

Q. You remember the wreck as an independent factor?

A. Yes, sir.

Q. Do you remember seeing Engineer Temples?

A. No, sir, he was removed before I got there.

Q. Now, engineers usually carry their bags in the engine, don't they?

A. Some do, and some set them in the express car.

Q. This engine was badly burned?

A. The cab was torn off and had rolled down the hill. I don't think it was burned.

Q. It was not burned?

A. Not that I remember.

Q. You are sure?

A. I don't remember that it was.

Q. Did you see the engineer?

A. I did not.

[fol. 41] Q. It must have been some time before you got there?

A. It must have been an hour as my negroes lived all around there.

Q. Did any of the people that come to the wreck come over from beyond that bluff?

A. I could not tell you.

Q. They could have?

A. Yes, sir, but it would have been out of the way for them to come that way.

Q. Is the Southern Railway beyond that bluff?

A. No, sir, it is towards Aiken.

Q. A hand coming to see the track could have left his tools there and dropped them?

A. It was two or three miles from there. What did he want to bring them for?

Q. That is about as good an explanation of the presence of the tools as you know?

A. No, sir, if somebody brought them there, he wanted to carry them further than I did.

Q. Did you leave the employment of the railroad during the thirty days following the wreck?

A. No, sir.

Q. How long did you work continuously for this same railroad following the wreck?

A. About a year or a year and a half.

Q. And now you are fishing and trapping for a living?

A. Yes, sir.

Redirect examination.

By Mr. Gyles:

Q. About track walking,—you are somewhat of a track walker yourself?

A. Yes, sir.

Q. That was your job to walk the track where you were [fol. 42] working?

A. Yes, sir, that was what I had been paid for.

Q. Other men went over it?

A. Yes, sir, the Road Master went over it a dozen times I guess after I repaired it?

Q. The motor car you use went to Augusta?

A. Yes, sir.

Q. Over that same track?

A. Yes, sir.

Q. And you observed the track as you went along?

A. Yes, sir.

Q. About the cross ties you saw,—did you notice any dent on the ties?

A. The heel of the bar made an impression on them.

Q. Were new ties put in?

A. No, sir, some were re-built. The dents were fresh made with the heel of a bar.

Q. And you have gotton to the age in life now where you take it easier?

A. Yes, sir, I retired a few years ago.

Recross-examination.

By Mr. Arrowsmith:

Q. I believe you say it was new ties along where the wreck occurred?

A. Some were new and some were old.

Q. The ties from which the spikes had been drawn,—were they new or old?

A. Some were old and some new.

Q. Neither the old or new had any marks of bars on them before the wreck?

A. No, sir, no need of that. The spikes were driven without the necessity of a bar heel until they were pulled out of the ties.

[fol. 43] Q. When you were working the track didn't you take the spikes out of an old tie?

A. When you go to pull it out.

Q. And you put the old tie back in again?

A. No, sir, not those.

Q. I asked if you had ever done that?

A. Yes, sir, I have picked out the good ties and carried them to another point.

Q. You make a positive statement to these gentlemen that not a si-gle one of the ties in the neighborhood of the wreck had a heel mark on it before the wreck?

A. No, sir.

Q. And every tie in one hundred yards of there had no heel mark on it?

A. No, sir, I said at the wreck.

Q. Just as soon as you came up after the wreck you could see the heel mark?

A. Yes, sir.

Q. You knew that those heel marks could not have been made by any tool of the Atlantic Coast Line Railroad Company?

A. At that time, I didn't know. The tools could have been stolen from the other parties as they were stolen from the Southern Railway.

Q. They were found two days after the wreck?

A. Yes, sir, the second day after the wreck the tools were found by Mr. Dobson.

Q. Is there anything peculiar about the heel of the bar of your tools?

A. No, sir.

Q. Yet you said to the jury that the heel of that bar made the impression?

A. No, sir, I didn't say that. Practically all of the tools are made by the same machinery.

[fol. 44] Q. Then you don't say that this particular bar made that impression?

A. I did not.

Redirect examination.

By Mr. Gyles:

Q. When you go to pull out an old tie, that is when you make the impression?

A. Yes, sir.

Q. And until you do that, is there any need to use the bar?

A. No, sir.

Q. That is when you make the impression of the bar?

A. Yes, sir.

Q. When you move the tie out?

A. Yes, sir, and burn them.

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JACK STEVENS, a witness for the defendant, was called, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. Where do you work?

A. Beech Island Lumber Company.

Q. That is on the Savannah River side?

A. At Beech Island, yes, sir.

Q. Do you remember the occasion of this wreck?

A. I was working on the railroad at the time.

Q. What was your job?

A. Section hand.

Q. Mr. Leach was your boss?

A. Yes, sir.

Q. Do you remember the day when this wreck happened?

A. I don't remember the date.

Q. You remember the day it happened?

[fol. 45] A. I remember the wreck.

Q. Now, at that time, was your crew working along where that wreck was, or where was it working?

A. The day just before the wreck, as near as I can come at it, we were between the six and seven mile post working.

Q. How far is that away from where the wreck occurred?

A. About two miles is as close as I can come to it.

Q. The six and seven mile station,—is Beach Island station near the six mile post?

A. Yes, sir, about the station. The six mile post sets below the station.

Q. About what mile post was it where the wreck occurred that morning?

A. Between the four and five mile post.

Q. You and your crew had not done any work down where this wreck occurred at that time?

A. No, sir.

Q. You know about how long it had been since you had done any work there?

A. No, sir.

Q. Had it been some time?

A. No, sir, I don't remember when we had worked there, but I know it has been a good while.

Q. The day after the wreck happened did you all go down there to clear up the wreck?

A. Yes, sir, we were called down there that morning after the wreck.

Q. That was after it happened?

A. Yes, sir.

Q. Had you worked at this place where the wreck happened some month or two before this?

A. I don't know, sir.

[fol. 46] Q. It has been so long you don't remember?

A. No, sir.

Q. Did you work on the railroad up to the six and seven mile post where they were working then?

A. You mean did I work regular?

Q. Yes.

A. Yes, sir, I would be off or sick some time, but that was my regular job.

Cross-examination.

By Mr. Arrowsmith:

Q. How old are you?
A. 28.
Q. Are you married?
A. Yes, sir.
Q. How many children?
A. Seven. Three living, and four dead.
Q. Where were you living in May, 1921?
A. On Mr. John Westbrook's place.
Q. That was in May, 1921?
A. Yes, sir.
Q. What happened to impress that fact on your mind?
A. I married in 1920.
Q. How long,—you started to work for the railroad, how long after you were married?
A. I don't know really.
Q. About two years?
A. It has been a good while.
Q. Two or three years after you were married you started to work for the railroad?
A. No, sir, it may have been six months.
Q. What time of 1920 did you get married in?
A. In August.
Q. You have forgotten all about this thing?
A. Yes, sir, I didn't keep the record of it. I think we [fol. 47] got it clear.
Q. Who told you that you were at the six or seven mile post the day before the wreck happened?
A. We stopped that morning I remember to get a push car and go there.
Q. You talked to somebody about the case this morning, didn't you?
A. No, sir.
Q. Yesterday?
A. No, sir, I am just trying to think it up.
Q. This is the first time you testified about this case, I believe?
A. Yes, sir.
Q. Then you have talked with somebody about this case since 1921?
A. Not as I know of.

Q. You didn't talk with Mr. Leach about it?
A. Not as I know of it.
Q. They went to a lot of trouble to find you?
A. They sent some man with a notice.
Q. You came to Aiken yesterday?
A. Yes, sir.
Q. And talked with the railroad people?
A. They said they put it off until today.
Q. You talked with them about the case?
A. Not in particular.
Q. Did anybody read any papers?
A. One man was saying something. Him and the section foreman were in there together.
Q. And they called you in?
A. Yes, sir.
Q. That is where you got the idea that you were working at the six or seven mile post the day of the wreck?
A. No, sir, I was trying to think back as near as I could [fol. 48] and tell you.
Q. Who asked you to think back?
A. I thought it was going to come up today, and I wanted to tell the truth.
Q. They stopped to get the push car?
A. We stopped there that morning.
Q. They didn't send you for it?
A. No, sir, we stopped on the way between there.
Q. Where were you coming from?
A. The section house.
Q. What mile post is the section house?
A. It is between the seventh and the eighth.
Q. Towards Ellenton?
A. Yes, sir.
Q. You had come from about the eight mile post down to the six or seven mile post to get the car?
A. The section house is between eight and seven mile post.
Q. How far was the car from the section house?
A. It was between the seven and six.
Q. Mile post?
A. Yes, sir.
Q. You left it out there?
A. We were working and using it to haul ties.
Q. You left your tools?
A. No, sir.

Q. How did you carry them?
A. On the motor car.
Q. You left your hand car out there?
A. When we had a lot of ties to haul we did.
Q. How long since you had been over the track where the wreck occurred?
A. I don't know.

[fol. 49] Redirect examination.

By Mr. Gyles:

Q. You don't know where the rest of the section crew are do you?
A. No, sir, some of them are dead.
Q. They are scattered around now?
A. Yes, sir, and some of them are dead. I don't know where they are.

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T. H. Dean, a witness for the defendants, was called, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. Where do you live?
A. Now?
Q. Yes?
A. Jacksonville.
Q. Are you a railroad man?
A. Yes, sir.
Q. At the time of the wreck in question, on the 20th of May, 1921, where were you living?
A. Augusta.
Q. What was your position?
A. Road master.
Q. Of what road?
A. The C. & W. C. Railway Company.
Q. What is your position now?
A. I am not with the road now.
Q. Did you have supervision of this particular track when you were with this railroad?
A. Yes, sir.

Q. How much of the track did you have in charge?
[fol. 50] A. From Augusta to Port Royal.
Q. Did you have occasion to inspect the track the day before the wreck?
A. I was over the track a couple of times the day before the wreck.
Q. Did you make an inspection of the track?
A. Yes, sir, in the morning and in the afternoon.
Q. Of the 19th?
A. Yes, sir.
Q. What condition was the track in?
A. Good.
Q. It did not need anything to be done to it?
A. No, sir.
Q. Was there anything wrong with it?
A. Nothing at all.
Q. Did you go back to Augusta that evening?
A. I did.
Q. How late in the afternoon of the 19th of May did you make an inspection of the track?
A. I judge about 5:30.
Q. Then you went to Augusta?
A. Yes, sir.
Q. You carefully inspected the track?
A. Yes, sir.
Q. What did you next hear of the wreck?
A. Mr. Jeffords called me up the next morning about four or five o'clock and told me about the wreck.
Q. It is in testimony that the road men were working between the six and seven mile post—do you know about that?
A. Yes, sir, I do.
Q. Where were they working?
A. Between the six and seven mile post.
Q. Had they been working down where the wreck was [fol. 51] for some time?
A. They had not.
Q. Had they not re-built this track and was going on down the road?
A. Yes, sir.
Q. What work were they doing?
A. Lining and gauging.

Q. Tell what you heard about the wreck and did and saw?

A. All I know is somebody tampered with it and caused a derailment——

Mr. Arrowsmith: We object to that. He cannot tell what he heard.

Mr. Gyles (continuing):

Q. What did you do?

A. Mr. Jeffords called me and told me about the wreck, and asked me to meet him at the Court-house, and we went down and found the rail taken out.

Q. What about the bolts?

A. The spikes were pulled and the bolts were taken out, and the rail was shoved out of place.

Q. Describe that?

A. The outside spike was pulled and the bolt was taken out of the angle bar, and all of the fastening was loose and the rail shoved out of position.

Q. That caused what?

A. Derailment.

Q. Did you see any dents in the ties where the bar had pulled them up?

A. Yes, sir,

Q. Had those dents been there before?

A. No, sir, there was no occasion for them to be.

Q. Would dents be on new ties?

A. Not without there was some occasion for it. There [fol. 52] was no occasion for it.

Q. Did you see the tools found?

A. No, sir, I didn't see them.

Q. Did you have the wreck fixed up?

A. Yes, sir, I got the trains to running and I got busy at some thing else.

Q. Was the spikes pulled or what?

A. Yes, sir, they were pulled out.

Q. Any doubt about that?

A. It is impossible to get the spikes out unless they were pulled out. They were pulled out and was laying on the ground.

Q. If a train had come along and mashed them, would they have been in that condition?

A. No, sir.

Q. What part of the track were they pulled out of?
A. Scattered along the whole rail there.

Cross-examination.

By Mr. Arrowsmith:

Q. How long did you remain with the railroad after this wreck in May, 1921?
A. Something like two and a half years.
Q. The same road?
A. Yes, sir.
Q. Same capacity?
A. Yes, sir.
Q. And the same job?
A. Yes, sir.
Q. What is the distance from Augusta to Port Royal?
A. I think it is one hundred and twelve miles.
Q. That was your line?
A. Yes, sir.
Q. You had supervision of the track then for one hun-
[fol. 53] dred and twelve miles?
A. Yes, sir.
Q. How frequently did you make a tour over the entire track?
A. To Port Royal?
Q. Yes.
A. Two or three times a week.
Q. In electric cars?
A. Sometimes motor cars and sometimes on a train.
Q. You mean when you said that you made inspections that you rode over it on a train and motor car?
A. Yes, sir.
Q. Have you any independent recollection of where the gang was working the afternoon before?
A. Yes, sir, I do. I spent a good deal of time with them and I remember it.
Q. How many gangs did you have?
A. I think it was twelve section gangs, and probably two or three bridge gangs.
Q. How did you designate the different gangs?
A. By numbers.
Q. What number was this gang?
A. I don't recall.

Q. Let's assume that this was number one—can you tell where number two gang was working on the day before?

A. If I had a wreck to mark that occasion I would know where they were.

Q. The only gang you can remember is this particular gang?

A. Yes, sir.

Q. And you don't know the number of it?

A. No, sir, I have been away from the road five years, and I don't recall.

Q. The cause of the wreck you say was that a rail had [fol. 54] been taken out?

A. Yes, sir.

Q. You adhere to that statement?

A. Yes, sir.

Q. That the fastenings had all been pulled loose?

A. Yes, sir.

Q. And all were laying on the ground or cross tie?

A. Yes, sir.

Q. And they were scattered all along at the end of the rail?

A. Yes, sir, the spikes were. The bolts were there at the end towards Augusta where they were taken out.

Redirect examination.

By Mr. Gyles:

Q. Do you know whether the inspection made there by the section foreman and yourself, was the usual and customary method of inspecting tracks?

A. Yes, sir.

Q. That was the usual way to inspect in railroading?

A. Yes, sir.

Recross-examination.

By Mr. Arrowsmith:

Q. As a matter of fact, all modern railroads have track walkers now?

A. I don't know whether they do or not, but we have them in the yard.

Q. Does the Pennsylvania Railroad, on the main line, maintain track walkers?

A. I didn't work for them.
Q. What about the N. R. P.?
A. The same thing.
Q. What about the Atlantic Coast Line?
A. Each foreman would inspect the track by walking [fol. 55] up and down the track.
Q. Was Mr. Leach one of the men?
A. Yes, sir.
Q. Was he a competent man?
A. Yes, sir, he was a competent foreman.
Q. Was he one of the competent men you had in mind when you made that statement?
A. If he had a competent man employed, he would send him to look at the track?
Q. You mean he would just pick up one of his day laborers, and that is all?
A. Yes, sir, that is it.

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THOMAS W. DAVIES, a witness for the defendant, was called, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. Where do you live?
A. Beech Island?
Q. You are a planter there?
A. Yes, sir, and I am engaged in the pulp wood business.
Q. This place where this wreck occurred,—the railroad ran through your land?
A. Yes, sir, on each side.
Q. You go in how far?
A. To the river bank, and back this way a good distance in there.
Q. How many acres in that particular tract of yours?
A. Two hundred and eighty-five.
Q. Do you remember the occasion of this wreck?
A. Yes, sir, I do.
[fol. 56] Q. Did you go down there?
A. Yes, I went there on the morning of the wreck.

Q. Tell just what you found the condition of the rail and track was?

A. The morning of the wreck when I arrived at my farm up on the hill some distance where you can look over to the railroad track, and usually notice a train passing by the smoke or the noise of the train running, and I know it was quite early and about sun rise, and I saw a lot of smoke in that section where the wreck was, and I asked one of the negroes there what was the trouble, and he said I think there is a wreck down there, and I said how do you know, and he said I hear them shifting and hear people talking, and I went down, and they had removed the Pullman cars, but the engine and other cars were off,—and I asked some one what caused the wreck——

Mr. Williams: Don't tell what they said. We will object to that.

Witness: Well I walked down to where the engine had left the track, and I noticed where the rail was separated. The rail going from Augusta was set in.

Mr. Gyles (continuing):

Q. The whole rail or one end?

A. One end. To be set in the plates had to be removed, and the angle bar was loose. That was the end of the rail down towards Ellenton on the right hand side, and the bolts or nuts were near the end of it, and on the track or on the side, but I think were on the track.

Q. How many of the bolts had been withdrawn?

A. They had to be loose to be taken out.

Q. How many of them?

A. Several.

Q. About how many?

A. Two or three of them. The bolts had been loosed [fol. 57] and the spikes had been drawn so as to set the rail in.

Q. That was done?

A. Yes, sir.

Q. Did you see any evidence of tools there?

A. No, sir, this was very early in the morning. There was very few people there except the train crew.

Q. Do you know as a matter of fact whether that track had not already been re-built and made over and was in good condition?

A. Some time before that—I don't know whether it was three weeks or two months,—the track was practically built over, and they took out the old cross ties and put in new ones, and the track had had time to settle, and I know that because I had a cow to get killed down towards Ellenton some time before that, and I had occasion to go over the track, and the track was in very good condition before this.

Q. Were these hands working about that place or a mile or two out there?

A. They had not been working there for some time. As well as I remember they were working down the way towards Ellenton.

Q. The day before the wreck the track was in nice condition?

A. In good shape.

Q. What is the distance about from Beech Island Station to the place of the wreck?

A. A mile and a half or a mile and a quarter.

Q. Is there or not a curve between the place of the wreck and Beech Island Station?

A. Yes, sir, quite a curve.

Q. If a man was crossing the railroad at Beech Island Station, and looking towards the wreck, could he see the place of the wreck?

[fol. 58] A. No, sir, it was impossible.

Q. Could he see near the wreck?

A. Not in a quarter of a mile.

Q. Then to see anybody,—he would have to be how far from the wreck?

A. Over a half mile or further.

Q. If those hands were working around the six or seven mile post as they have stated,—a man crossing the track at Beech Island Station,—he could see those, could he not?

A. I think he could by looking down the track. That is a good distance, but I think he could see them.

Q. Your old pulp wood place is about where this wreck was?

A. A little South of it.

Q. A little South of where the wreck occurred?

A. Yes, sir.

Cross-examination.

By Mr. Williams:

Q. You all have a track there?

A. Yes, we have one.

Q. You have a contract with the railroad on it?

A. No, sir, we have no contract with them.

Q. You get on pleasantly with them?

A. No, I don't know. We have some awful rows about it sometimes.

Q. You get it?

A. What?

Q. You get what you want?

A. Yes, sir, by holding Col. Anderson over the head.

Q. You got the track?

A. Yes, sir, I own it.

Q. You got it retired?

[fol. 59] A. No, sir, I own it in fee simple.

Q. They let you put it in there?

A. I had it put in.

Q. You have a track in there under an agreement with the railroad?

A. Yes, sir.

Q. How long before this wreck was it you went over and inspected this track?

A. The week before, I think, or during the week.

Q. There was nothing wrong with the track then?

A. Not as I could see.

Q. How long before the wreck were you down there on the road where the wreck was?

A. Two days.

Q. You got there on the morning of the wreck and found two rails disconnected?

A. Yes, sir, the track was torn up.

Q. The wreck had torn it up?

A. Yes, sir.

Q. Had the wreck thrown the rail off anywhere?

A. No, sir, it had not thrown it off.

Q. The rail was spiked down?

A. The rail that caused the wreck was there——

Q. How do you know which one caused it?

A. By looking at it. It is natural to suppose that the flanges of a car wheel—the rail would have to be in line for it to stay on there.

Q. And that was out of line at that point?

A. Yes, sir.

Q. You know it was out of line?

A. Yes, sir, because it was changed.

Q. Was it spiked down?

A. Yes, sir, on the outside.

Q. What for?

[fol. 60] A. To hold it in place.

Q. When the flange hit the rail on the end of it it made a dent in it?

A. Yes, sir.

Q. Where a wheel or something hit the end of the rail—how far was the dent in the rail from the end?

A. It was right on the center of the track as I remember.

Q. And there is where it quit the track?

A. Yes.

Q. It had something like that?

A. No, sir, it was in this way (indicating).

Q. This is one rail here,—you come down and fix them for us?

A. Get something of the same diameter. Suppose the flange was straight, and this rail was in, then it would go off here,—(indicating to counsel). Those two pencils are supposed to be the same size, and if you move one this way, and one this way,—it puts them out of line, you see.

Q. Which one was out of line?

A. The one down towards Ellenton.

Q. Where did it hit?

A. It came in here (indicating).

Q. The wheel hit the end of the rail going towards Augusta?

A. Yes, sir, the right hand one.

Q. How far from the edge of the rail was it where the dent was?

A. I didn't measure it.

Q. If the rail had been further in or out it would not have hit it?

A. No, sir, the rail was out of alignment.

Q. What caused it?

[fol. 61] A. Several spikes were drawn up and the rail was pushed in and then driven down in new place.

Q. How many of them?

A. Not as many as should have been to hold a rail accurately.

Q. How many were there?

A. I know there was one.

Q. How many more?

A. I don't know how many there were, but I know there was one.

Q. How many more?

A. There may have been two or three. I know there was one because I saw it.

Q. How far was it driven in from the place where it was pulled out before?

A. I would say an inch or so.

Q. The track was pulled in an inch or so?

A. Yes, sir.

Q. And the spike was driven down to hold it?

A. Yes, sir.

Q. Where was the hammer?

A. I don't know. I didn't see any one drive it.

Q. Did you see one or more spikes?

A. I saw one I am certain.

Q. How far is that from the end of the rail?

A. About a foot and a half.

Q. Was one driven down at the end of the rail?

A. No, sir, I didn't see that.

Q. That made the train jump off on the right?

A. Yes.

Q. Because it hit the end of the rail pointing towards Augusta?

A. Yes, sir.

Q. Was the rail pointing off from Augusta pushed in [fol. 62] or out?

A. It was pushed in I told you.

Q. Now, do you mean to tell me that that heavy train running there with that big steel rail with a spike on there would jump that rail before it would press it in?

A. Yes, sir.

Q. Who showed you that?

A. I don't remember any one in particular.

Q. Some railroad men were there?

A. I think Major Twiggs was there.

Q. Your idea is that that spike held the heavy steel rail bent in an inch?

A. Yes, sir.

Q. What will bend one of those heavy rails?

A. A man or engine or something. It twisted several of them.

Redirect examination.

By Mr. Gyles.

Q. How far is it from the railroad track out to where the tools were found?

A. I would say over one hundred feet. It was some little distance.

Q. How far is that bluff?

A. Twenty-five feet, I guess.

Q. Did you see the place where the tools were found?

A. Yes, sir.

Q. How far was the top of the hill from the place where the tools were found?

A. About fifteen feet I would say.

Q. What time did you get down to the wreck the next morning?

A. Around six o'clock.

Q. You saw where the end of the rail had been pushed [fol. 63] in a little?

A. Yes, sir, or moved in.

Q. Would it have been possible for a train to have gone in either direction with the rail in that condition?

Mr. Arrowsmith: I object to that.

Mr. Gyles (continuing):

Q. Well, have you seen trains going along there all of your life?

A. Yes, sir.

Q. Have you seen trains going every day by there?

A. Yes, sir.

Q. Would you say a train could go in either direction with the rail pushed out as it was?

Mr. Arrowsmith: I object to that.

The Court: I think that is a matter for the jury to say.

Recross-examination.

By Mr. Williams:

Q. How far out of line did you say the end of the rail looked like it was?

A. Several inches. From one to three inches I would say out of line.

Q. Which was it?

A. I don't know. That is for the jury to determine.

Q. I want them to have that information now?

A. They can work on that? It was from one to three. I don't know.

Q. Was this rail bent out around one inch or three inches at the end?

A. I don't know.

Q. How far down the rail was it where the spikes were in the ties?

A. Four or five feet back.

Q. How much was the rail bent where the spikes were [fol. 64] not in the rail?

A. One to three inches.

Q. The spike had to be driven in the cross tie?

A. Yes, sir, I saw it driven there.

Q. How far was that spike moved to?

A. About two inches.

Q. Then the rail was about two inches in?

A. No sir, it would all depend.

Q. It was bent two inches from two feet back to where it was spiked three or four feet?

A. Not necessarily.

Q. I want to know how much bend that rail had in it,—you can tell us?

A. It varied from one to three inches.

Q. At the end?

A. Yes, sir, at the end. That will give you the ratio in proportion.

Q. That was about four feet to where the spikes held the rail in its original position?

A. About five feet I would say.

Q. It was about two inches out of position at the end?

A. Yes, sir.

Q. It was close in for the engine to have hit the end of the rail?

A. Yes, sir.
Q. At what point did it hit it on?
A. It didn't hit it plumb.
Q. Which side did it hit it on?
A. On the left side.
Q. That is correct?
A. Yes, sir.
Q. On the left side of the center of the railroad that the engine was approaching?
A. Yes, sir.
[fol. 65] Q. That is right isn't it?
A. Yes, sir.
Q. No misunderstanding about that?
A. No, sir.

Redirect examination.

By Mr. Gyles:

Q. The angle bars that connect the two rails had been removed?
A. Yes, sir.
Q. At each end or one end?
A. It had been entirely removed so you could release the rial.
Q. Would not that angle bar have released the rail?
A. Certainly it would.

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R. G. Smith, a witness for the defendant, was called, sworn, and testified ae follows:

Direct examination.

By Mr. Gyles:

Q. What is your position, Mr. Smith?
A. Train Dispatcher.
Q. Where do you live?
A. Augusta.
Q. In May, 1921, did you live in Augusta?
A. Yes sir.

Q. Were you a dispatcher then?

A. Yes, sir.

Q. Did your office and your work cover this point where the wreck occurred on the 19th day of May, 1921?

A. Yes, sir.

Q. And just before that and just afterwards, I pre-

[fol. 66] sume?

A. Yes, sir.

Q. Have you any record showing the trains passing over the track during the day of the 19th of May, 1921?

A. Yes, sir.

Q. What is that book you have?

A. Train sheet.

Q. What does it show?

A. A record of all trains that pass over the road, and a chart showing the movement.

Q. Under whose orders and direction did those trains pass?

A. The Dispatcher's.

Q. You gave the orders?

A. Yes, sir.

Q. And make a record of it?

A. Yes, sir.

Mr. Gyles: We offer this page of the record or train book in evidence.

(Train sheet offered in evidence by the defendant, and marked by the stenographer as Exhibit No. 2 in this case).

Mr. Gyles (continuing):

Q. Now, tell us what trains passed over this place on the 19th of May?

A. The time that I was on duty——

Q. What time were you on duty?

A. From four p. m. until twelve o'clock midnight.

Q. On the 19th of May?

A. Yes, sir, 19th of May, 1921.

Q. Go ahead now, with your record?

A. Train No. 211 left Robbins at 4:20 p. m., arriving at Augusta at 5:45 p. m.

Q. That train reached Augusta at 5:45 p. m.?

[fol. 67] A. Yes, sir.

Q. About what time would that make it pass the place of the wreck?

A. About 5:30 or 5:35 p. m.

Q. On the 19th of May?

A. Yes, sir.

Q. Who was the engineer and conductor in charge of that train?

A. Conductor Richards and Engineer Byrd.

Q. Now, what is the next one?

A. Train No. 15.

Q. Where did that run to?

A. It left Robbins at 3:15 p. m., and arrived in Augusta at 7:25 p. m.

Q. About what time did it pass this place?

A. About 7:15 p. m., or approximately that time.

Q. What kind of train was that?

A. Local freight.

Q. Who was the conductor and engineer?

A. Conductor Whilden and Engineer Skelton.

Q. What kind of train was No. 211?

A. Freight train.

Q. Atlantic Coast Line or C. W. C. train?

A. Coast Line train.

Q. The next was what?

A. It was a C. & W. C. train.

Q. Have you any other trains?

A. Yes, sir, train No. 210, which is a Coast Line freight train, left Augusta at 6:20 p. m., and arrived at Robbins at 7:25 p. m.

Q. About what time did that pass the place of the wreck?

A. About 6:30 p. m.

Q. Who was conductor and engineer?

[fol. 68] A. Conductor Zeigler and Engineer Pope.

Q. What kind of a train was that?

A. Coast Line freight train.

Q. Have you any others?

A. Yes, sir, we had a passenger train that left Robbins at——

Q. What number?

A. Number 45. It left Robbins at 5:20 p. m., and arrived in Augusta at 6:30 p. m.

Q. What time did it pass the wreck

A. About 6:30.

Q. Who were the conductor and engineer?

A. That was Conductor Bush and Engineer Dimmock.

Q. That was what kind of train?

A. Passenger train. It was a C. & W. C.

Q. Did either of those two trains pass each other near the wreck?

A. Yes, sir, No. 15 and No. 210 met at Beech Island, which is just beyond there.

Q. That is all of the trains you have in your book?

A. Yes, sir.

Q. About what time did trains No. 210 and 15 meet at Beech Island?

A. About 6:40.

Q. That is the 19th?

A. Yes, sir.

Q. The wreck happened that night, or the next morning about three o'clock?

A. Yes, sir, on the morning of the 20th.

Q. That covers from four o'clock in the afternoon until twelve o'clock at night on the 19th of May?

A. Yes, sir.

[fol. 69] Cross-examination.

By Mr. Arrowsmith:

Q. About how far is it from the place of the wreck to the place where you mark the train at Augusta—you mean when you say Augusta, that it is entering the freight yard or tracks?

A. Yes, sir, they enter at the Western end.

Q. How far is it from the place of the wreck to where they enter the yards at Augusta?

A. I judge about a mile and a half.

Q. Therefore, No. 211, leaving Robbins at 4:20, and arriving at the edge of the freight yard in Augusta at 5:45 p. m., came in pretty slow?

A. Yes, sir.

Q. How far is Robbins from the freight yard?

A. Twenty-eight miles.

Q. When it got to this point, it took it how long to run from there to the yards?

A. I could not say, as they slow down for the Savannah River bridge.

Q. Now, it took No. 211 about ten minutes to negotiate that mile and a half?

A. I could not say approximately. It may have been five or fifteen.

Q. That is equally true then of No. 15, leaving Robbins at 3:15 p. m.?

A. No, sir; that is a local freight and they stop all along the road.

Q. You said it passed the point of the wreck down on the river at 7:10?

A. Yes, sir, approximately. I am only judging by the time they arrive at Augusta.

Q. Then No. 210 left Augusta at 6:20?

A. Yes, sir.

[fol. 70] Q. It got to Robbins at 7:25?

A. Yes, sir.

Q. And passed the place of the wreck about 6:30?

A. Yes, sir, that is right.

Q. No. 45 left Robbins at 5:20 p. m. and got to the yards at 6:30?

A. That is arrival at the Union Depot after they pass through the city.

Q. What time did you say that passed the place of the wreck?

A. Very probably 6:20 or 6:15 possibly.

Q. Now, it takes a train fifteen minutes, or ten or fifteen minutes, to negotiate a mile and a half or two miles in there—Nos. 15 and 210 were at a practical standstill at the point of the wreck?

A. No, sir, there was nothing to cause them to stand still at that point,

Q. They passed there?

A. They met at Beech Island.

Q. Where is that?

A. That is beyond there.

Q. How far?

A. It is six miles from Augusta, and the wreck was about one-half a mile the other side of the Savannah River bridge.

Q. How far is the beginning of the passing track from the place of the wreck?

A. It may be a mile.

Q. Towards Augusta?

A. Yes, sir.

Q. In all probability they would be passing slowly or operating slowly at that point,—either for the purpose of slowing down or had not gained speed?

A. No, sir. they have to come to a stop at the Savannah [fol. 71] River bridge before they get in the yard, and this wreck occurred one-half a mile from the bridge.

Q. You say in your testimony it took about ten minutes to negotiate a mile and a half there?

A. Yes, sir, but they have to go through the yard limits, and look out for switch engines and pass switches and things like that.

Q. Now, only one train passed from 4:20 in the afternoon to midnight of the 19th going away from Augusta?

A. Yes, sir, and that was number 210.

Q. Three trains went over this track coming in?

A. Yes, sir.

Q. Was there any other train between midnight and the wrecked train?

A. There were others.

Q. Going?

A. I was not on duty.

Q. You have the book there?

A. Yes, sir.

Mr. Gyles: We are going to put up the other Dispatcher. This gentleman was just on from four p. m. until twelve o'clock.

Mr. Arrowsmith (continuing):

Q. What is the nearest telegraph office to the place of the wreck?

A. The yard office at Augusta.

Redirect examination.

By Mr. Gyles:

Q. What is it that makes a train go slow until it gets across the river?

A. They have to slow down before they get to the river in order to stop at the river. There is a draw bridge across there, and they have to stop, and passing through

the yard they have to go carefully, and watch out for en-
[fol. 72] gines and all.

Q. That makes it go slow in the yard?

A. Yes, sir.

Q. The passing track is at Beech Island station?

A. Yes, sir.

Q. And that was a mile and a half or two miles from where the wreck occurred?

A. I don't know the exact location of the wreck.

Q. But is a good long distance from there?

A. Yes, sir.

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K. McNiel, a witness for the defendant, was called, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. What is your position?

A. Train dispatcher.

Q. Are you still one?

A. Yes, sir.

Q. And were you such in May, 1921?

A. Yes, sir.

Q. Have you any record there showing the 19th day of May, 1921, and the trains?

A. Yes, sir, I have a record of the whole month.

Q. Turn to it?

A. Do you want the 19th or the 20th?

Q. Take the 20th?

A. All right then.

Q. That starts when?

A. Twelve o'clock midnight.

Q. Of the 19th and beginning on the 20th?

A. Yes, sir.

Q. And it takes you until when?

A. Eight a. m. on the morning of the 20th.

[fol. 73] Mr. Gyles: We offer that page or sheet in evidence.

(Page of train book offered in evidence by the defendant, and marked by the stenographer as Exhibit No. 3 herein.)

Mr. Gyles (continuing):

Q. Before we go into that book,—where do the freight trains register as they come into Augusa,—at the yard or station?

A. At the yard office.

Q. Where do the passenger trains register?

A. They register there too.

Q. Do they also register at the station?

A. No, sir, but they register the time at the station also.

Q. Commencing at midnight on the 20th or beginning at the 20th,—show what trains passed over that place of the wreck?

A. Yes, sir.

Q. Your time sheet covers this place of the wreck?

A. Yes, sir.

Q. What is the next one?

A. Number 95, is the next one.

Q. Who was the engineer and conductor?

A. Conductor Willis and Engineer Beardman.

Q. Where did it come from?

A. It left Yemassee at 8:40 p. m. or the 19th of May, and arrived at Augusta at 1:35 a. m. on the morning of the 20th.

Q. What was that?

A. C. & W. C. through freight.

Q. About what time would you say then that it passed the place of the wreck, about one-half mile beyond the bridge?

A. About 1:25.

[fol. 74] Q. On the morning of the wreck?

A. Yes, sir.

Q. What is the next one?

A. Number thirty-seven (37).

Q. What is that?

A. That is a Atlantic Coast Line passenger train, and it is Conductor Dixon and Engineer Rutherford.

Q. Where did it leave from?

A. Robbins at 12:55 a. m., and it arrived at the Union depot at 1:55 a. m.

Q. About what time would that pass the place of the wreck?

A. About 1:35.

Q. What is next?

A. Number 92, Conductor Given and Engineer Fitzgerald. They left Augusta yard at 12:15 a. m., and arrived at Yemassee at 5:55 a. m.

Q. They left Augusta at 12:15 a. m.?

A. Yes, sir, the yard office.

Q. About what time did it pass the place of the wreck?

A. About 12:30.

Q. Have you another one?

A. The next one is the one that was wrecked, and it is No. 38.

Q. Where did it leave from?

A. Union Station.

Q. What time?

A. At 2:50 a. m.

Q. That is ten minutes of three o'clock?

A. Yes, sir.

Q. Where was that going to?

A. Going on to Robbins on the C. & W. C. tracks.

Q. That No. 92,—what kind of train was that?

A. C. & W. C. freight train.

[fol. 75] Q. And this last one was what?

A. Atlantic Coast Line passenger train. Conductor Timmerman and Engineer Temples were in charge of that, and Mr. Temples was killed.

Q. About what time would you say that train got to the place of the wreck?

A. About 3:10 a. m.

Q. You have three trains passing over that track between twelve at night and three o'clock in the morning at the time the train was wrecked?

A. Yes, sir.

Q. That No. 95 was a freight train?

A. Yes, sir.

Q. No. 37 was a passenger?

A. Yes, sir.

Q. And No. 92 was a freight?

A. Yes, sir.

Q. And No. 38 was a passenger train that was wrecked?

A. Yes, sir.

Q. You were on duty when the wreck occurred?

A. Yes, sir.

Q. How did you hear of it?

A. The flagman from the train that was wrecked came back to the yard office in Augusta and telephoned the yard operator, and he notified me.

Q. What did you do?

A. Called the wrecker and the officers.

Cross examination.

By Mr. Arrowsmith:

Q. If I understand you, at 1:25 a train passed over this point going to Augusta,—from Yemassee,—and at 1:35 a train passed this point going from Robbins to Augusta, [fol. 76] and at 3:10 this train was wrecked at that point?

A. Yes, sir, at 3:10.

Q. Now, why do you say about 3:10?

A. There is no way of knowing exactly.

Q. It left Augusta at 2:50?

A. Yes sir.

Q. Normally, it would take how long to reach this point where the wreck occurred?

A. Eighteen or twenty minutes from the Union Station.

Q. How long would it take it to get to the Savannah River bridge?

A. About fifteen minutes.

Q. It would then take about three minutes to make the Savannah River bridge and then this point?

A. Yes, sir, three to five minutes.

Q. The Savannah River is naturally in a valley, and the track inclines upward?

A. The track goes over the leve- to cross the river.

Q. That is on the other side?

A. Yes, sir.

Q. Going to Augusta it is down and then coming this way it is up?

A. No, sir, it is mostly level where the wreck occurred.

Q. Therefore, after crossing the river it would open up?

A. Not until he left the bridge.

Q. This didn't happen on the trestle?

A. No, sir.

Q. And the condition was such that he had been opened up about a half mile when the wreck occurred?

A. Yes, sir.

Q. That is true isn't it.
A. Yes, sir.

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[fol. 77] W. Q. JEFFORDS, a witness for the defendants, was called, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. In May, 1921, what position did you hold with the railroad, if any?
A. General Road Master of the Coast Line tracks.
Q. On the morning of the 20th, after the wreck, did you have occasion to go down there?
A. Yes, sir.
Q. Describe to the jury what you saw?
A. I came in on our train 35 that morning, and I heard of the wreck and went on over there, and it is part of my duty to investigate derailments, and determine the cause, and I found that the rail on the right hand side of the track had been removed.
Q. Going towards Ellenton?
A. Yes, sir.
Q. Going away from Augusta?
A. Yes, sir, and the bolts and angle bars were taken off of the rails, and they were laying on the ground when I got there, and it was about 9:30 then. The spikes had been pulled and were laying between the ties where they had been pulled. This train that was derailed there, when it struck this place where the rail was out of position there was nothing to do but to roll out.
Q. How long have you been in the service of the railroad company, Mr. Jeffords?
A. Since January, 1874, and that is 54 years.
Q. For fifty-four years?
A. Yes, sir.
Q. You started a long time ago?
A. I was fourteen years of age when I started.
[fol. 78] Q. You have had a lot of experience with wrecks?
A. Yes, sir, and when I started out they were very poor railroads, but we now have good railroads.

Q. Seeing the condition of the track as it was there, with the angle bars loose, and the spikes taken out of the track as you saw it, would it have been possible for any train to have passed in either direction over the track without going off?

A. None whatever.

Mr. Arrowsmith: We object to that. He saw it after the wreck. Our position is that it is competent to state the facts as he observed them following the wreck, and as to whether those facts existed immediately before the wreck or was caused by the wreck is a question for the jury,—and as to whether or not another train could have passed is not essential here.

The Court: I think he had better follow the rule and state what he saw.

Mr. Gyles: I think he can state the facts, and give his conclusions.

The Court: About certain things. I never recall seeing a case where that point is different from the usual one.

Mr. Gyles (continuing):

Q. Describe how those bolts were taken out and the spikes and all.

A. It was the plainest case I ever saw of a rail being removed and a wrecked train.

Mr. Arrowsmith: We object to that.

The Court: Yes, sir, strike that out.

Mr. Gyles (continuing):

Q. How were those spikes removed?

A. With a crow bar.

Q. Were they pulled out clean and clear?

A. Yes, sir, and laid to one side, and the angle bars [fol. 79] were moved from the joints, and the rail pushed out eight or ten inches from its original position, and was laying on the side when I got there.

Q. If a rail had been removed or the spikes taken out by a train crashing there—would the spike holes have been clean cut or what?

A. If a train gets off of the track it will spread the spikes back and back them back, but this is a clean cut case of the spikes and rail being taken out.

Mr. Arrowsmith: We object to that. He is expressing an opinion.

The Court: He cannot express an opinion.

Mr. McKay: I think the rule is that a man qualified as an expert can state the conditions as he saw them, and then draw his conclusions.

The Court: Yes, sir, about certain matters, but physical facts,—it is like the case in the State v. Summers from Newberry,—where the physician was allowed to testify that certain marks upon a woman's throat were made by human hands,—and the Supreme Court said that was a mistake. That he could describe the marks, but that the agency should be left for the jury. I understand a witness can say whether a man was mad or glad or suffering pain, but you take a matter of physical facts, I think that is a question for the jury.

Mr. McKay: The inquiry is how those spikes got out, and I thought that this witness could tell as to how they were pushed out.

The Court: He can describe it, and let the jury say how they came out. I am always willing to listen Mr. McKay, if you can find any authority. I am frank to admit that I don't understand the rule, and I don't believe anybody else does.

Mr. Gyles (continuing):

[fol. 80] Q. Did you see the tools?

A. No, sir, I did not.

Q. Did you see the indent in the ties where the spikes had been pulled out?

A. I didn't particularly notice that. The engine was turned over, and the derrick had not gotten out there when I got there. They had pulled the two Pullman cars back.

Q. Describe how that rail was,—was it carried forward from its original place in the track?

A. Yes, sir, it carried this particular rail six or eight feet ahead, and it was pushed out of position.

Q. That rail in front of the particular rail that you have just mentioned,—did you notice whether or not that was in alignment or not?

A. Yes, practically, yes, sir,—but I didn't particularly notice that because that was thirty-three (33) feet away from the cause of the trouble.

Q. Did you notice any mark on the front rail?
A. I did not.

Cross-examination.

By Mr. Arrowsmith:

Q. I believe one of your duties was to investigate derailments?
A. Yes, sir, that is one of my duties.
Q. They kept you right busy?
A. Yes, sir, occasionally we have a wreck. It has been so ever since the history of the railroad, and will be so as long as we run trains.
Q. You say that the right hand rail was out of alignment eight or ten inches?
A. Yes, sir.
Q. And the fact that it was out of alignment caused the [fol. 81] wreck?
A. Yes, sir, that entire rail was loose and removed from the spikes.
Q. I judge from what you say, all of the spikes of the rail had been removed and the joints connecting?
A. Yes, sir.
Q. And this rail removed?
A. Yes, sir.
Q. Before this train arrived?
A. Yes, sir.
Q. And the witness that testified that one end was still bolted, and that it had been bent one or two inches out are in conflict with you?
A. No, sir, that was a different rail entirely.
Q. I understood Mr. Davies to say that what caused the wreck was that a rail had been disconnected at a joint, and bent out so that the flange of the wheel struck the end of the rail and caused the wreck?
A. No, sir.
Q. You don't agree with him?
A. No, sir, I certainly do not.
Q. When it got to the rail that he was talking about, it was how?
A. Running on top of the ties along then.
Q. How many rails were taken loose?
A. I saw only one.

Q. Then you and he must have seen the same rail?

A. I don't know which one he saw, but I am telling you what I saw.

Q. There was only one with the spikes pulled out?

A. Yes, sir, that I saw.

Q. At that time you had sixty-two years' experience with the railroad?

A. No, sir, not that much.

[fol. 82] Q. In 1921, how much experience had you had with the railroad Company?

A. Since 1874.

Q. You had years of observation then?

A. Yes, sir.

Q. And naturally your observation was keen from your training and experience?

A. It was worth something.

Q. And if there had been any other rails with the spikes taken out then you certainly would have seen it?

A. I think so.

Q. You and he must have seen the same rail?

A. No, sir, he was talking about the rail ahead.

Q. He said that the rail just this side of the rail that was bent was still in place?

A. I don't know what he said.

Q. It is hardly probable that the train jumped the track and struck the cross ties and then got on the end of the rail and bruised this place on the end?

A. I don't think that is possible.

Q. If there was any sign there,—that is not hardly probable?

A. No, sir, if any sign was on the end of the rail some wreckage might have hit it and caused it.

Q. As I understand you, this rail was completely removed?

A. Yes, sir, from its permanent position or condition. It was removed six or eight inches.

Q. That would necessitate taking every spike out?

A. Only on the outside.

Q. You would not take out the inside?

A. No, sir, you take a bar and push it out.

Q. You would have to disconnect the plates on the end of the rail?

[fol. 83] A. Yes, sir.

Q. Where were the spikes?

A. Lying between the ties where they were pulled.

Q. Off on both sides?

A. No, sir, I just noticed the outside spikes. I don't think they were pulled. It is not necessary to get a rail out.

Q. What is the weight of one of those rails in use there?

A. It is eighty pounds to the yard, and it is thirty-three feet long.

Q. That is about eight hundred pounds?

A. Yes, sir, something like that. That is the standard weight.

Q. You judge from what you saw after the wreck that that was the condition before the wreck?

A. I don't know how you mean.

Q. The rail I understand you to say had been removed some six or eight feet down the track?

A. Yes, sir, pulled ahead, but I presume that the train did that as it was wrecked. It carried the rail with it I would say.

Q. You judge from what you saw that it was eight or ten inches out of line before the wreck, and it was still eight or ten inches out of line after the wreck, but carried ahead six or eight feet.

A. Yes, sir, carried ahead.

Q. Were the flange marks on the ties on the outside or inside of the line of track?

A. When the engine struck the ties it demolished them, and you could not tell about that.

Q. In that space the engine demolished the ties and left the spikes laying on them?

A. I said the engine ran along on the ties.

[fol. 84] Q. It didn't tear them up?

A. They were marked on the outside.

Q. Were they marked within or outside of the line of the rail?

A. Outside of the line of the rail.

Q. But between the line of the rail and where this rail actually was?

A. No, sir, outside.

Q. Here is the line of the rail, and this rail was removed eight or ten inches outside (indicating to the witness),—now, where were the flange marks on the ties,—was it inside or out here?

A. What few marks I saw was only a short distance from where it hit them. In a short space it was off of the track entirely.

Q. Here, we will say is the rail that was moved out eight or ten inches,—and this is the inside?

A. Yes, sir,—but my recollection is that that was a joint here, and one was here—and this rail had been pulled out and was laying in that angle—and I will not say it was eight inches or six inches, but it was out well from the permanent place. It was outside of its original position.

Q. Now, the train got off of the track here?

A. Yes, sir.

Q. When she hit here, naturally the wheel had to hit the cross ties?

A. Yes, sir.

Q. And from here to about here (indicating to the witness) she tore up the cross ties?

A. Yes, sir, they were marked to about here.

Q. Were those flange marks out here or how (indicating to the witness)?

A. They were left of the rail when I saw it, and to the [fol. 85] right of the original line of it.

Q. Did the train go the half length of this rail before it turned over?

A. I cannot remember, but I thought it was about one hundred feet until it turned over.

Q. That is longer than the rail?

A. About three lengths of the rail, yes, sir.

Q. You construe Mr. Davies testimony to mean that instead of this being the rail that was scarred on the end,—you say it was this blue one instead of the yellow one (indicating to the witness)?

A. The one after you had the thirty feet opening there.

Q. Did you notice any scar on the end of this rail (indicating to the witness)?

A. I didn't notice it at all.

Q. Did you notice any scar on the end of this one?

A. I didn't notice.

Q. That is a determination that you reached about it then,—having made no investigation to see whether there was a scar on the end of the rail represented by the yellow

pencil, and having made no investigation as to the scar on the blue pencil—that is simply a conclusion that Mr. Davies and Mr. Dobson are talking about one rail when they describe another?

A. I don't know what they were talking about, but I am telling what I know.

Q. You know that?

A. Yes, sir.

Q. As I understand you,—conditions were very different after the wreck than before?

A. I didn't see it before the wreck.

Q. Allowing for the speed of the train, we must assume that conditions were different after the wreck?

A. I don't know.

[fol. 86] Q. We must assume they were?

A. I don't know.

Q. There were no torn up cross ties before the wreck?

A. No, sir, it looked as if it was in good condition before the wreck.

Q. Now, in your opinion, could one person within a period of an hour and a half take loose the angle plates on the end of the rail and remove the spikes and move that rail out of position?

A. Yes, sir, I think so. He could do it easily. There is about eight bolts and four would join, and it is a very short time.

Q. No trouble to remove one of those rails?

A. It is troublesome, but it would not take an hour and a half to do it.

Q. You don't think so?

A. No.

Q. Do you believe an individual could remove the spikes on one end of the rail and bend it in and spike it down again?

A. I didn't see anything bent and spiked down.

Q. I am asking if it could be done?

A. Yes, sir, if you pull the spikes out the rail is very easy to move with a bar.

Q. Here is a rail spiked on both side- for two-thirds of the distance and then the spikes are pulled out,—could an individual from that point bend that rail at all and then hold it bent and spike it down?

A. I have seen men rip it up in guaging the track, and if you find it out of guage you pull it down and bring it to a guage.

Q. The reason that you have to do that is because it frequently happened or happens that you find the track out of line?

[fol. 87] A. Not frequently, but we cure it when we do.

Q. That is frequently the cause of a derailment?

A. No, sir, only a small amount of them.

Q. It is an occurrence?

A. Yes, sir, but only a small percentage will happen in that way.

Q. This was practically a new road bed?

A. No, sir, it was an old road worked over and made over. They had put in new cross ties and surfaced the track and worked it over.

Q. The work was practically new?

A. Well, it looked as if it had been done a month or two.

Q. They had several trains passing over that point during the night?

A. Yes, sir.

Q. And this train is wrecked at this point?

A. It was.

Q. As far as you know, you have no evidence as to the condition immediately before the wreck except as you described it after the wreck?

A. That is correct.

Q. Now, do I understand you to say that one man could bend the rail?

A. Yes, sir, he can do it, but it is faster for two men to do it.

Q. One man can do it?

A. Yes, sir, it is very practical.

Q. And frequently done?

A. Yes, sir.

Redirect examination.

By Mr. Gyles:

Q. You got to the place of the wreck after the wreck?

[fol. 88] A. Yes, sir.

Q. What you have stated about the rail was your observation after the wreck?

A. Yes, sir.

Q. As to the custom of inspecting tracks,—what is the custom as to that?

A. Our practice and custom is where we have General Road Masters, I try and see my important tracks about one time a week, and I have seven different Road Masters in my territory, and they try and see the tracks three or four times a week, and I have some twelve hundred miles of track.

Q. Is it necessary to see the track every day?

A. No, sir, you have to look after it all. It is like a farm. You cannot work one side and fail to work the other.

Q. It would require a great army of men to look at every piece of the track every day?

A. We could not do it with the business we are doing.

Q. Testimony that the track was inspected two or three times a week,—is that proper?

A. Yes, sir.

Q. Is it or not that track walkers are more to look out for sparks and all?

A. Yes, sir, we don't practice having track walkers in this section, but they do in the mountains where they have slides and disasters can happen in a minute, but we don't do it down here. We have bridge watchmen to watch bridges.

Q. Is it or not true that track walkers are more to look out for sparks and all?

A. The engineers and conductors on the Coast Line, if they feel a little bad place in the track or something they tell me about it, and I see about it and have it repaired.

[fol. 89] Q. How are inspections made generally?

A. Most of them are in motor cars and on the rear of a train. That is the way I do.

Q. In looking at tracks as you pass, you can tell at a glance the condition of the track?

A. Yes, sir, I have caught a many broken rail running forty miles an hour.

Q. You made your inspections on the rear of trains and in motor cars?

A. Yes, sir, generally.

Q. And cure any defects that you find in the tracks and road bed?

A. Yes, sir.

L. S. JEFFORDS, a witness for the defendants, was called, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. You are a son of the gentleman that was just on the stand?

A. Yes, sir.

Q. What was your position in 1921?

A. I was Engineer of Maintenance of Way for the C. & W. C. Railroad Company.

Q. Now,—what is your position?

A. At this time.

Q. Yes?

A. Superintendent of the C. & W. C. Railway Company.

Q. Do you remember the occasion of the wreck?

A. Yes, sir.

[fol. 90] Q. Where were you?

A. In Augusta.

Q. Did you hear of it when?

A. About four o'clock.

Q. Did you go to the wreck?

A. Yes, sir, immediately.

Q. What time did you get there?

A. About 5:30 I guess.

Q. Describe what you saw there?

A. On arrival at the wreck with the Road Master, I met the conductor about half way the train. I first asked if anybody was injured. The flagman had reported the accident, but had not had time to investigate and see who was injured, and when we arrived at the scene we didn't know the extent of the damage, or who was injured, and I asked the conductor who was hurt, and he said that the engineer was killed, and the fireman slightly injured, and I asked what cause he found as to the wreck, and he said——

Mr. Arrowsmith: I think that he had best describe what he saw.

The Court: Yes, sir.

Mr. Gyles (continuing):

Q. Tell what you saw?

A. I saw where one rail on the right hand side had apparently been moved out from the track. In other words,

the rail was out when I saw it, and it was resting on the head of the tie, and was shoved ahead six or eight or ten feet, and the angle bars had been removed apparently from either end of the rail, because I found two pair of angle bars,—one at each end, and I found a little pile of nuts and bolts at the joint, and several spikes laying on the outside of the rail.

Q. Describe the holes from which the spikes had been [fol. 91] drawn, and whether they had been mashed out by the train striking it or not?

A. The indication was that they had been drawn. It was a clear hole.

Q. And the spikes laying near-by?

A. Yes, sir.

Q. How close was the spikes laying?

A. On the right hand side, and between the ties, and just at the head of the ties, and about two feet from where the rail was in its original position.

Q. And disconnected from the holes from which they had come?

A. Yes, sir.

Q. The angle irons were laying about where the joints of the rail would be?

A. Yes, sir.

Q. What about the bolts?

A. The bolts and nuts and locks were all in a pile at the end of the rail.

Q. How long have you been railroading?

A. About nineteen years.

Q. You are familiar with the tracks and bolts and occasional wrecks?

A. Yes, sir.

Q. You have had lots of experience.

A. Yes, sir.

Q. State whether or not it would be possible for bolts and ties, or rather spikes and angle bars or irons to be in that position by the action of a train knocking them in that position?

A. Not hardly.

Q. From the situation you saw there—the clear holes and the spikes lying clear of those holes and between the ties, and the angle bars at the end of the rails—would you

[fol. 92] say that any train going in either direction could have gone over there without being derailed?

A. It would have been a physical impossibility.

Q. In regard to inspection of tracks—what have you to say as to the custom of that in this territory?

A. The Road Master inspects his division, which as a usual thing consists of one hundred to one hundred and twenty-five miles, four or five times a week, and half of the train, and the section men are required to go over the track in their section one day in each week, and throw each switch. In addition to that it was my duty at the time to cover the territory as often as possible, and I covered each division at least once a week.

Q. Did you cover the section there that week?

A. I was over it on Tuesday prior to the accident.

Q. This accident occurred about three o'clock on Friday morning?

A. Yes, sir.

Q. Do you know anything about the engineers and conductors making reports?

A. The instructions on the C. & W. C. Railway, is that engineers make a close watch, and they frequently make reports, and in fact daily do so, and they report as to angle bars, and sometimes even no water in the tanks, and in other words they are our eyes.

Q. Is it practical to have a man cover each part of the track every day?

A. That is impracticable.

Cross-examination.

By Mr. Arrowsmith:

Q. I believe that no witness has testified before as to the nuts and bolts being in piles—have you heard that?

[fol. 93] A. I don't know as I have.

Q. Have you seen the section crew at work?

A. Many times.

Q. When they are working at the angle bars and take off nuts and bolts they usually pile them together so they can put them back together?

A. I have never noticed that.

Q. People usually take the nuts off a pile that way and pile them up?

A. No rail was removed from January back until May, and there was no necessity for the foreman to remove the rail.

Q. How do section hands pull a spike out—do they bend them or pull them quick?

A. They pull them clear.

Q. They pull them clear and do not bend them?

A. As a rule, yes, sir.

Q. Where do they leave spikes?

A. They are instructed to gather them up and take them to the section house. They usually do that.

Q. That is a usual thing?

A. Yes, sir.

Q. It is human to err?

A. Yes, sir.

Q. Section hands are full of humanity?

A. Yes, sir, no doubt about that.

Q. It is the duty of the section master to inspect his tracks two times a week?

A. Yes, sir, his section.

Q. Sometimes he doesn't do that?

A. Well, the Road Master is over the track and he is in close touch with his foreman.

Q. If the section master says I have inspected this par-
[fol. 94] ticular piece of road on Tuesday and Saturday you must accept his word?

A. Yes, sir.

Q. You say you had been over this particular piece of track on Tuesday?

A. Yes, sir.

Q. Making an inspection of it?

A. Yes, sir.

Q. Was is a necessary inspection?

A. It was a usual inspection.

Q. What were you riding?

A. A motor car down and train back.

Q. That is the customary method of making inspections?

A. Yes, sir.

Q. You went down on the motor car and back on the train on that day?

A. That is correct.

Q. Do I understand that the spikes were drawn on both sides of the rail or only one?

A. No, sir, only on the outside.

Q. On the outside?

A. Yes.

Q. All of the spikes the full length of the rail on the outside?

A. The Ellenton end or East end of the rail was buried under the baggage car, and about half of the distance of the rail the ties were not badly damaged and you could see the wheel marks.

Q. Was the end towards Ellenton still in line with that end of the track?

A. No, sir.

Q. It was out of line then?

A. Yes, sir.

[fol. 95] Q. Therefore all of the spikes on the outside of the rail had been removed for the entire length of the rail?

A. Yes, sir, that is my opinion.

Q. Would you say that every spike had been cleanly pulled out?

A. I can only testify to what I saw, and I told you that the first half of the rail you could see where the spikes had been cleanly pulled, but on the other half you could not tell what had happened.

Q. In that situation—if the spikes had been pulled on the outside for half the distance of the rails, and the spikes to have been in tact on the other half, it would have been entirely possible for trains to go and come all night without getting off?

A. No, sir, I don't think so.

Q. Why?

A. A South bound train going to Augusta with the weight on a rail for sixteen or seventeen feet would have a tendency to push it out.

Q. If it was spiked securely on the Ellenton end when the train went over it—it would pull it back into alignment?

A. No, sir, I think it would pull it out when the train passed over it.

Q. Do you know that?

A. I am so certain about it that I say that. If I go out and jump in front of a car I am going to get killed. That is just how certain I am about it.

Mr. Gyles: Now, if the Court please, I have some witnesses that I wish to put up out of order but they have to get away.

The Court: All right.

[fol. 96] O. H. Byrd, a witness for the defendants, was called, sworn, and testified as follows:

Direct examination.

By Mr. McKay:

Q. Are you an engineer for the Atlantic Coast Line Railroad Company?

A. Yes, sir.

Q. Were you an engineer in 1921 at the time of the accident in question?

A. Yes, sir.

Q. Do you know whether or not you were in charge of train No. 211, that passed that spot the afternoon before the accident?

A. Yes, sir, I was on No. 211 on that date.

Q. You passed the very spot of the accident?

A. I passed over it yesterday.

Q. State whether or not in passing over that spot—did you notice anything unusual?

A. No, sir, and if I had I would have reported it.

Q. If, in passing over a joint or any portion of the track—you notice something unusual about the track—what do you do about it?

A. Make a report. If it is very unusual we stop and put out a flag and make a report to the first telegraph office we reach.

Q. If you come across something that might indicate a defect in the track—what do you do?

A. Make a report to the superintendent of the road upon reaching the first telegraph office.

Q. You noticed nothing in the track?

A. No, sir.

Q. And you were on train No. 211?

A. Yes, sir.

[fol. 97] Cross-examination.

By Mr. Arrowsmith:

Q. You knew Mr. Temples well?

A. Yes, sir, we were neighbors. I lived across the street from him.

Q. You knew his old mother?

Q. Yes, sir, I am acquainted well with the family.

Q. Mr. Temples, at the time of the fatal wreck, was about 47 years of age?

A. I judge so.

Q. He had been an engineer for about twenty years?

A. Yes, sir, I found him here when I came in 1906.

Q. He was one of the prize engineers of the Atlantic Coast Line?

A. He was a good man.

Q. At the time of his death he earned how much?

A. $256.00 a month.

Q. He was healthy and vigorous?

A. Yes, sir.

Q. He was a married man?

A. Yes, sir, and had three children.

Q. One girl and two little boys?

A. Yes, sir.

Q. One of the boys is grown?

A. Yes, sir.

Q. And has a job with the Coast Line now?

A. Yes, sir, he is a fireman.

Q. Where are the other two children?

A. I could not say, but I have heard.

Q. In the Home for the Feeble Minded?

A. Yes, sir.

Q. He separated from his wife?

A. He told me so.

Q. And the children stayed with the Grandmother after [fol. 98] his death?

A. Yes, sir.

Q. He had no means?

A. Nothing but what he worked for like the rest of us.

Q. You passed there going to Augusta the afternoon before the wreck?

A. Yes, sir.

Q. What is the situation there with respect to the road bed—is it level?

A. It is practically level, and is just the water grade of the river.

Q. When you are going down you are slowing up for the draw bridge?

A. Yes, sir.

Q. And when you are coming up you have a slight incline and you are of course picking up your speed—having stopped at the draw bridge?

A. Yes, sir.

Redirect examination.

By Mr. McKay:

Q. You are a neighbor of the Temples?

A. Yes, sir, I live across the street from them.

Q. J. R. Temples is the young man you mentioned?

A. Yes, sir, I suppose the son is J. R., Jr. The one that was killed was J. R. too.

Q. The younger Mr. Temples is now working for the Atlantic Coast Line?

A. Yes, sir.

Q. How old is he?

A. About twenty-two (22) now, I suppose. I would judge that. I don't know his age exactly.

Q. They have in the complaint—this young fellow as [fol. 99] being one of the beneficiaries of the action—do you know about that?

A. No, sir, I didn't know any case was pending until I was called to come to Court.

Q. You know Mrs. Temples, the administratrix?

A. Yes, sir.

Q. Does she live near you?

A. I saw her one day at the station about ten months ago, and she said she was running a place in Brunswick or somewhere. She was running a hotel.

Q. She does not live in Florence then?

A. Not then.

Q. Which one do you mean?

A. This is the widow of the engineer that was killed I am talking about.

Q. What about his mother?

A. She lives in a little home on the outskirts of Florence, and just across Jeffords Creek.

Q. Have you seen her recently?

A. I could not say, I have not heard of her leaving Florence.

Q. The other children have been put in some institution?

A. I have been told that.

Q. They lived for a long time with their Grandmother, I believe?

A. Yes, sir, I would pass the place and see them and talk with them.

Recross-examination.

By Mr. Arrowsmith:

Q. John is married?

A. Yes, sir, and has a baby.

Q. He is doing light house-keeping on Church street?

[fol. 100] A. I don't know.

Q. Old Mr. Temple, the Grand-father, was an engineer?

A. Yes, sir.

Q. And the son that is now dead was an engineer?

A. Yes, sir.

Q. And now the grandson, little Joe, is a fireman, and trying to learn to become an engineer?

A. Yes, sir.

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C. E. SKELTON, a witness for the defendants, was called, sworn, and testified as follows:

Direct examination.

By Mr. McKay:

Q. For what railroad do you work?

A. C. & W. C. Railway Company.

Q. Where do you live?

A. Augusta.

Q. Do you recall the fact of an accident in May, 1921, not so far from Augusta?

A. Yes, sir.

Q. State whether or not on the evening prior to the accident you ran over that road and passed the point of the derailment?

A. Yes, sir, about seven o'clock, I guess.

Q. Going to Augusta?

A. Yes, sir.

Q. State to the jury your duties while operating an engine if you discover a defect in the track?

A. The safe thing is to leave a man in charge if it is a bad defect, and the first thing to do is to report it at the [fol. 101] first telegraph station, and if it is just a rough place you report it too.

Q. State whether or not defects in tracks sometimes make themselves known in that way to engineers on the engines?

A. Yes, sir, you can detect it right away when you hit a low spot or a broken rail.

Q. When you hit a broken rail you go off pretty hard?

A. It is like a hole with an automobile.

Q. State whether or not in passing this place the afternoon before you noticed any defect?

A. No, sir, there was no defect there as far as I know. I did not notice any with my train.

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J. F. Pope was called as a witness for the defendant, sworn, and testified as follows:

Direct examination.

By Mr. McKay:

Q. What railroad company are you engineer for?

A. Atlantic Coast Line Railroad Company.

Q. You live at Florence?

A. Yes, sir.

Q. You recall the fact of a derailment on the C. & W. C. Railway tracks near Augusta, in May, 1921?

A. Yes, sir.

Q. State whether or not the evening prior to the accident you operated an engine over that particular piece of track?

A. Yes, sir.

Q. State what are your duties if you discover a defect in the track?

[fol. 102] A. It is our duty to report it to the Superintendent or the Road Master,—or a Section Master if there is one handy.

Q. State whether or not on this occasion you observed any such defect?

A. Nothing noticeable.

Q. You would have reported it if you had noticed it?
A. Yes, sir.

Cross-examination.

By Mr. Arrowsmith:

Q. When your engine passes a rail where one spike had been removed, could you detect it?
A. No, sir.
Q. Or two spikes?
A. No, sir.
Q. Or three?
A. I would not say how many have to be removed to detect it.

Redirect examination.

By Mr. McKay:

Q. If half of the spikes were removed and the angle bar, would you notice it?
A. Yes, sir, I think so.

Recross-examination.

By Mr. Arrowsmith:

Q. Why?
A. Because there would be a racket.
Q. If you were not paying particular attention to the sound you would not detect it?
A. Your ears are trained to such a sound.
Q. You were going to Florence?
A. Yes, sir.
[fol. 103] Q. What was your engine doing?
A. Pulling the train.
Q. Making a grade?
A. There is no grade there hardly.
Q. One of the engineers said there was a little one?
A. Not much.
Q. Your engine was working hard?
A. We generally let them out after we get across the river.
Q. The harder your engine pulls, and the more noise you make, the less likelihood you would have in discovering the unusual joint?

A. No, sir, but an unusual joint will always make itself known.

Q. You are a specialist on joints?

A. No, sir, but I know something about them.

Redirect examination.

By Mr. McKay:

Q. If you hit a bad joint at a rapid rate it would make a big noise?

A. Yes, sir, more than likely.

Q. And if you have loose angle bars you would know it?

A. Yes, sir, more than likely.

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J. H. DIMMOCK, a witness for the defendants, was called, sworn, and testified as follows:

Direct examination.

By Mr. McKay:

Q. You are an engineer for what company?

A. For the C. & W. C. Railway Company.

[fol. 104] Q. In May, 1921, you were an engineer for the same company?

A. Yes, sir.

Q. You recall the derailment in question on the morning of the 20th of May, do you not?

A. Yes, sir.

Q. Do you know whether or not on the afternoon prior to the wreck you were in charge of an engine that passed over this place?

A. Yes, sir.

Q. Which way were you going?

A. To Augusta.

Q. In regard to the ascertaining and report of apparent defects in the road bed and tracks,—what are your duties in that respect?

A. Report them to the Superintendent and the Road Master, and if it is very dangerous you stop and report to the Section Master.

Q. State whether or not in passing this particular spot that night if you found any defect in the tracks you found necessary to report?

A. None whatever.

Cross-examination.

By Mr. Arrowsmith:

Q. As a matter of fact, you don't remember anything about that trip?

A. I guess I do.

Q. All you remember is that you were an engineer that brought a certain train into Augusta at a certain time the night before?

A. Yes, sir.

Q. That is all you know about it?

A. Yes, sir, that is about all.

[fol. 105] Redirect examination.

By Mr. McKay:

Q. State whether or not the fact of a wreck occurring the next morning might serve to keep you in mind of that trip?

A. Yes, sir.

Recross-examination.

By Mr. Arrowsmith.

Q. That is all that you know then?

A. I might tell you too much if I told you more.

Q. Have you any information you want to tell?

A. No, sir.

Q. Come down then?

A. All right.

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J. L. BEARDEN, a witness for the defendants, was called, sworn, and testified as follows:

Direct examination.

By Mr. McKay:

Q. Where do you live?

A. Augusta.

Q. Do you work for the C. & W. C. Railway Company?

A. Yes, sir.

Q. At that time,—in May, 1921, were you an engineer for the C. & W. C. Railway?

A. Yes, sir.

Q. State whether or not on the afternoon or night just prior to the early morninng of the 20th of May, 1921, when this wreck occurred,—if you were operating a train over this particular section of the track?

A. Yes, sir.

[fol. 106] Q. Were you going from Augusta?

A. No, sir, coming in from Yemassee.

Q. What were your duties as to reporting apparent defects in the road bed or tracks?

A. If it is a broken rail or anything that might be dangerous it is our duty to leave a man there to protect it until we can get a road section man there or the Superintendent there.

Q. If it is not so serious, what do you do?

A. Report it to headquarters when we go in, and if we meet a train we stop the engineer and tell him.

Q. According to the records here, you passed the point of the wreck about 1:25 last night?

A. Yes, sir.

Q. State whether or not on this occasion you discovered any defective spot at the point of derailment?

A. No, sir, I did not.

(No cross-examination.)

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W. J. Rutherford was called as a witness for the defendant-, sworn, and testified as follows:

Direct examination.

By Mr. McKay:

Q. In May, 1921, were you an engineer for the Atlantic Coast Line Railroad Company?

A. Yes, sir.

Q. How long have you been an engineer for the Atlantic Coast Line in that capacity?

A. I was transferred there in 1900 from the C. & W. C. Railway Company.

Q. Prior to 1900 you were with the C. & W. C. Railway [fol. 107] Company then?

A. Yes, sir.

Q. Do you recall this derailment in question?

A. Yes, sir.

Q. State whether or not a short time prior to the wreck on the morning of the 20th of May, 1921, you operated an engine pulling a train over this particular spot or section of the road?

A. Yes, sir, about 1:35.

Q. That morning?

A. Yes, sir.

Q. Which way were you going?

A. To Augusta.

Q. State whether or not you noticed anything unusual about the condition of the road about at that point where the wreck occurred?

A. There was nothing the matter with it that I know of.

Q. Nothing to indicate any roughness?

A. No, sir.

Q. Or looseness of joints?

A. No, sir.

Q. When did you hear of the derailment?

A. About an hour and a half later. I took the train and went over the Southern railroad to Florence.

Q. They got the Pullman and carried it back to Augusta?

A. Yes, sir.

Q. And you proceeded to take it to Florence?

A. Yes, sir.

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[fol. 108] W. C. FITZGERALD, a witness for the defendants, was called, sworn, and testified as follows:

Direct examination.

By Mr. McKay:

Q. You live in Augusta, too?

A. Yes, sir.

Q. In 1921, were you an engineer for the Atlantic Coast Line Railroad Company?

A. No, sir, I was with the C. — W. C. Railway.

Q. On the night of the derailment that occurred,—first, prior to the derailment on the early morning of the 20th of May, 1921, you operated an engine drawing a train of cars over this track?

A. Yes, sir, I cannot remember that far back, but I suppose I was. I was in Yemassee.

Q. You remember the wreck?

A. Yes, sir, I heard of it by wire at Yemassee after I got there.

Q. You remember that fact?

A. Yes, sir.

Q. The derailment had occurred behind you?

A. Yes, sir.

Q. As an engineer,—what are your duties as to reporting any defects?

A. We report to the proper authority, such as section master and road master and superintendent of the road; just which we get to first.

Q. State whether or not on this occasion when you passed there you found any defect at that spot?

A. No, sir, none whatever.

(No cross-examination.)

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[fol. 109] Z. C. Craddock was called as a witness for the defendants and sworn and testified as follows:

Direct examination.

By Mr. McKay:

Q. You live at Augusta?

A. Laurens, S. Car.

Q. In 1921, were you at Augusta?

A. Yes, sir, I was.

Q. In May, 1921, the time of the wreck here?

A. Yes, sir.

Q. What was your duty at that time?

A. Wrecking foreman.

Q. As such you would go out with wrecking crews, and pick up damaged equipment?

A. Yes, sir.

Q. Did you go to this accident?

A. Yes, sir.

Q. About what time?

A. About 5:30.

Q. In the morning?

A. Yes, sir.

Q. When you got over to the scene of the derailment, state what you found?

A. The engine was turned over and two cars derailed.

Q. What was the condition of the track at that particular point?

A. One rail was ripped up and the spikes drawn from the ties, and the bolts taken out of the angel bars, and the bars displaced, and the rail shoved further.

Q. The rail was shoved?

A. Yes, sir, it was shoved forward.

Q. How far?

A. About seven or eight feet. We didn't measure it.

[fol. 110] Q. That is approximate?

A. Yes, sir.

Q. Did you notice the spikes on the rail as to whether they had been mashed out or drawn out?

A. They were drawn out.

Q. Why do you say that?

A. I have had twenty years experience in drawing them out.

Q. What is the difference?

A. If you draw them out, it is a clean cut hole, and if you mash them out the hole is larger.

Q. In all of your years of experience have you ever seen spikes drawn out by reason of the train going along and getting in a wreck?

A. No, sir, not drawn straight out.

Q. What is your experience as to the appearance when they are mashed out by a wreck?

A. It will crook the spike and mash in the hole.

Q. Did you find that condition to exist there?

A. No, sir.

Q. How long were you there?

A. I went with Mr. Jeffords on a motor car to see what would be needed.

Q. Then you took charge of the crew?

A. Yes, sir.

Q. Something was said about certain tools marked with the mark of the Southern Railway being found one hundred feet away—were you there when that was done?

A. I heard some of them say that they found some tools, but I was busy.

Q. You didn't see them?

A. No, sir.

Q. You were clearing away the wreckage?

A. Yes, sir.

[fol. 111] Cross-examination.

By Mr. Arrowsmith:

Q. You were among the first to get to the scene of the accident outside of the train crew itself?

A. I don't know. I went with the Road Master and the Superintendent.

Q. You found no other employees there except the train crew?

A. That is all.

Q. Therefore, no others were there?

A. Not that I know of.

Q. Describe the condition you found the engine in?

A. It was turned over and practically turned bottom upwards down there.

Q. With respect to fire, what had happened—had part of it burned?

A. No, sir, a lot of steam pipes were bursted.

Q. I mean did the wood work in the cab burn?

A. I don't think. There is only a few boards in the top of the cab.

Q. Did you see Mr. Temple's body?

A. No, sir.

Q. It had been removed before you arrived?

A. Yes, sir.

Q. The cab showed no evidence of fire?

A. It was torn up.

Q. Did you see them remove the burned remains of Engineer Temple's grip?

A. No, sir.

Q. How far was the engine from the rail that you described a while ago?

A. It was in the clear and down the embankment.

Q. Assuming it to have been level with the track itself; how many rails would it have been from the rail you have [fol. 112] described?

A. It ran about one hundred feet and turned bottom upwards down there.

Q. About one express or baggage car length between the broken rail and the engine?

A. No, sir, about one-third of it.

Q. Then there was a car on the roadbed entirely immediately over the place where you found the rail?

A. No, sir, one end was down the embankment and the other end was back on the track. Where the rail had been removed it was visible and nothing was over it.

Q. There were five cars in the train?

A. I don't remember.

Q. There was a Pullman car and a day coach, and second class coach and mail and express car?

A. What we found was two cars and an engine, and they had carried the others back.

Q. Were the back trucks of the second car you found there still on the rail?

A. You mean the second car from the engine?

Q. Yes?

A. Just one pair of trucks. The front part had been thrown off by the car that was half way down there.

Q. The disrupted rail you speak of was it beyond the front trucks of the car or behind it?

A. The rail had been misplaced, and there was two trucks derailed behind the rail that had been taken out. Thas is two pair of trucks.

Q. The engine had passed over that point?

A. Yes, sir.

Q. The first car had passed that point?

A. Yes, sir, it was down the embankment with the engine, or one end was.

Q. The second car—the front trucks had passed over [fol. 113] it you say?

A. No, sir, the rear trucks of the first car had not passed it.

Q. All that had passed over it was the engine and front trucks of the first car?

A. Yes, sir.

Q. The back trucks of the first car were on the place where this rail was involved?

A. No, sir, it was behind it.

Q. I want to know the position of the back trucks with respect to the place that this rail came from—I am speaking of the front car?

A. It was behind the rail that was moved and that caused the derailment.

Q. What was behind this place (indicating):

A. A pair of trucks.

Q. What trucks?

A. The rear trucks to the front car.

Q. The rear trucks of the front car then had not gotten to the loose rail?

A. No, sir.

Q. Then there was a torn up roadbed for about one hundred feet?

A. Yes, sir, practically that.

Q. What is the len-th of a car?

A. Different lengths.

Q. Well, this car?

A. About fifty-five (55) feet.

Q. Could you tell anything about conditions that existed before the wreck after the engine and first car passed the road bed?

A. I could see where the engine was derailed and ran off on the ties.

Q. Did it not tear up the road bed?

[fol. 114] A. No, sir, it hit eight or ten ties.

Q. You could not tell from those ties where bolts or spikes had been pulled out one way or another?

A. The bolts were lying down there.

Q. Could you tell how the spikes had been pulled out?

A. No, sir, but I could tell how they came out of the ties that were not torn up.

Q. Was there any difference in the way those ties were taken up and the way that section hands take out the spikes in any other work on the track?

A. No difference.

Q. Was there any difference in the appearance of the nuts and bolts as you saw them there than they were when being worked with by the section hands?

A. Surely there is.

Q. What is the difference?

A. How do you mean?

Q. What is the difference?

A. The section master will take a hammer and break the bolts out.

Q. After he breaks the bolts out—what does he do with it then?

A. Carry the scrap to the bend and put in a new one.

Q. He never puts back a bolt?

A. Not unless it is practically a new bolt.

Q. How long does it take a bolt to become old?

A. Two to three years.

Q. When they take the bolts out they don't just scatter them?

A. They put them back in.

Q. Before they have an opportunity to put them in—suppose they decide to knock off work until the next day?

A. They don't do that.

Q. I believe you said that the angle bars were misplaced [fol. 115] —what do you mean?

A. They were taken off, I said, and the rail was misplaced.

Q. You mean when you got there they were not connected up as usual?

A. No, sir.

Q. You don't know when they got off or how?

A. No, sir.

Q. Where were they?

A. Lying near the joint they come off of.

Q. Were they removed from both ends?

A. Yes, sir.

Q. The rail that you say was pushed down seven or eight feet—was it in line with the rail just ahead of it?

A. No, sir, it was on the outside of that rail.

Q. Were the ties pushed down in that section?

A. It cut off the end of the ties.

Q. Did it push them off?

A. It pushed the ends out a little.

Q. Was it dark when you got there?

A. No, sir, it was practically daylight.

Q. Do you recall the night on which this wreck occurred?

A. I don't remember about that.

Q. W-o helped you to clear the wreck the next day?

A. I cleared the main line with the C. & W. C. wrecker, and the Georgia wrecker helped.

Q. Did the section foreman, Mr. Leach, help you there?

A. No, sir.

Q. He did not?

A. No, sir, I used the yard force.

Q. You know Mr. Gunter?

A. No, sir.

[fol. 116] Q. Formerly the Solicitor of this county?

A. No, sir.

Q. Do you remember heretofore giving testimony in this court house in any manner affecting the wreck?

A. Yes, sir.

Q. I ask you if while under oath in this court house you did not testify, in response to this question—describe the appearance there as far as that rail was concerned and crossties, and whether or not you saw any evidence of spikes being removed or anything—do you remember that question being asked you?

A. I don't think I do.

Q. If that question had been asked you what would have been your answer?

A. Just what I told you.

Q. The same thing?

A. Yes, sir, that the spikes had been drawn.

Q. Did you have instructions from anybody to go and examine the track?

A. Yes, sir, I went with the superintendent there at that time.

Q. At the time of the wreck?

A. Yes, sir.

Q. Did you have instructions from the general road master to examine the tracks?

A. There was no general road master.

Q. Your testimony today is that the rail was on the outside?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. I will ask you if in answer to the question I read you if you did not answer as follows: "I had instructions from the general road master to examine the tracks, and

[fol. 117] I found a rail disconnected and shoved in the track so that the wheel was derailed''?

A. There is something wrong with it.

Q. Were you not asked the question where were the spikes?

A. Yes, sir.

Q. What was your answer?

A. Laying in the track.

Q. Inside or outside?

A. Laying in the track.

Q. Where were the bolts?

A. Laying where they were taken off.

Q. Taken off with what?

A. Wrench.

Q. What was the weight of the wrench?

A. I don't know.

Q. Didn't you tell Mr. Gunter?

A. I don't think I did.

Q. Didn't you exhibit the wrench here?

A. No, sir.

Q. No wrench was shown to you?

A. No, sir.

Q. Didn't Mr. Gunter ask you what is this—and you answered: a track wrench?

A. Yes, sir, but I don't know whether that was the wrench or not.

Q. Didn't you answer the question then that that wrench was an eighty (80) pound wrench?

A. Yes, sir, but I don't know whether that was the one that was used or not.

Mr. McKay: I don't see where they can examine him that way on an immaterial matter.

The Court: I think it is proper.

[fol. 118] Mr. Arrowsmith (continuing):

Q. Was the rail you saw there bent?

A. Yes, sir, on one end.

Q. Was it hit on the end?

A. Yes, sir.

Q. You so testified, didn't you?

A. Yes, sir, but which rail are you talking about?

Q. The same rail that Mr. Gunter asked you about?

A. You are talking about the one that was hit on the end.

Q. Do you say that they were different?

A. Yes, sir.

Q. You mean that the train ran off of a rail here, and went the entire distance which this rail had been removed of thirty-three feet (33), and then struck the end of this rail here?

A. Yes, sir, the track gauge is forty-eight and a half (48 1-2).

Q. Your testimony to Mr. Gunter, when he asked you if it had hit the end of the rail—you mean it related to this rail here, and not the one that was out of line (indicating to the witness)?

A. That is right. That is what I mean to say.

Q. That is what you told him?

A. We figured the driving wheel hit it.

Q. The rail that was taken up was not hit on the end?

A. Yes, sir, but there was one rail hit on the end.

Q. Which one—was it the one that was taken out?

A. No, sir.

Q. Which one?

A. The one ahead of it.

(Note.—It being 6 p. m. the Court here recessed until 9:30 a. m. the following morning.)

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[fol. 119] Z. C. Craddock, recalled as a witness for the defendants at 9:30 a. m. and testifiied as follows:

Cross-examination continued.

By Mr. Arrowsmith:

Q. I believe that we were discussing as to which rail had been struck on the end, and which you referred to in your testimony—that is where we left off?

A. I think so.

Q. You remember what we were talking about?

A. I guess so.

Q. What?

A. The rail and the wreck.

Q. It is the rail that was out of place that is the subject of this discussion—was it bent?

A. Yes, sir, on the east end a little bit.

Q. Were you asked that question by Solicitor Gunter?

A. I don't recall.

Q. You were asked that question—and you said, No, sir, that some wheel had hit the rail?

A. That was not the rail that was misplaced.

Q. How many rails were involved in the discussion then and now?

A. The one that the wheel hit was not bent.

Q. What are you talking about?

A. When the wreck occurred.

Q. Well, we are talking about the rail?

A. Allright.

Q. How far did the engine go before it turned over after it struck this place where the rail was involved?

A. About ninety (90) or one hundred feet (100).

Q. Then it turned over?

A. Yes, sir, it turned over in about ninety or one hundred feet.

[fol. 120] Q. And that was ninety or one hundred feet from the point where the first angle iron had been removed?

A. It was something like three rail lengths.

Q. That is the rail that had been removed and two more rails?

A. Yes, sir.

Q. I am going to read you the questions and answers on page thirty (30)—and one question is—was that rail bent, and you said, "No, sir," to that question. You said some wheel had hit the end of the rail. The rail was about that far away, and that you indicated. You said where the rail disconnected it was carried may be one hundred and fifty (150) feet?

A. Yes, sir.

Q. Are those questions and answers correct?

A. I don't understand about the one hundred and fifty (150) feet.

Q. That was your answer to the question?

A. What was the question.

Q. You heard me read it all?

A. I don't recall.

Q. Is that the correct record that took place between you and Mr. Gunter here?

A. I don't recall.

Q. You read over your testimony before you went on the stand here?

A. No, sir.

Q. You didn't go over it with the railroad attorneys?

A. No, sir.

Q. The fact is that one rail was involved in that inquiry then, and that is the same one that is involved in this inquiry?

A. There was one rail removed and one struck by a wheel. [fol. 121] Q. Now, if I understand you correctly, your testimony is that a rail was removed, and the engine ran across that place, and then struck the end of another rail —is that right?

A. Yes, sir.

Q. That is your testimony?

A. Yes, sir.

Redirect examination.

By Mr. McKay:

Q. This testimony that Mr. Arrowsmith has been reading is from the testimony taken on the trial here before?

A. Yes, sir.

Q. You were here at that time?

A. Yes, sir.

Q. The man was convicted was he not?

A. Yes, sir.

Mr. Arrowsmith: Yes, sir, but we object to that question.

The Court: I don't think that is competent, and I strike that out.

Mr. Arrowsmith: We ask you to instruct the jury to pay no attention to it.

The Court: Yes, sir, it is stricken out.

Mr. McKay (continuing):

Q. Now, you have your own wrecking crew who take charge of the equipment after a wreck?

A. Yes, sir.

Q. They were with you on this occasion?
A. Yes, sir.
Q. Who repaired the damage to the track?
A. The section master.
Q. Mr. Leach?
[fol. 122] A. Yes, sir.
Q. He was the section master?
A. Yes, sir.
Q. He had nothing to do with the wreck as pertaining to the equipment?
A. No, sir.
Q. Now, as brought out on cross-examination, the testimony both now and at the criminal trial of the inside rail pertained to two rails, did it not, instead of the one rail?
A. Yes, sir.
Q. At least two rails?
A. Yes, sir.
Q. Now, in reference to the rail, where the spikes had been entirely removed, what was the position of that after the wreck when you get there?
A. It was removed and shoved ahead six or eight feet.
Q. You don't know what caused it to be shoved ahead in that manner?
A. No, sir.
Q. Now, in reference to the rail that had not been entirely loosened, but which was just ahead of the rail that you have just spoken of—was that rail bent?
A. No, sir, but the spikes had been pulled out.
Q. That rail was not bent?
A. No, sir.
Q. Now, when the Solicitor asked you this question—was this your answer—was that rail bent—that is the question now, and the answer there is, "No, sir, that rail was about that far away, but some wheel hit it"—was that your answer?
A. Yes, sir.
Q. Was that your testimony then?
A. Yes, sir.
[fol. 123] Q. And it is your testimony now?
A. Yes, sir.

Recross-examination.

By Mr. Arrowsmith:

Q. Do I understand that you said to Mr. McKay that that was your testimony on the previous trial?

A. I told him it was.

Q. How do you know?

A. (This question was not answered.)

Q. Do you remember that question—you said "yes" because Mr. McKay was reading the question to you?

A. I remember their asking me about the rail being struck.

Q. You remember that question?

A. After he read it, yes, sir.

Q. You can remember the questions I ask you then?

A. Yes, sir, if they are correct I can remember.

Q. From whom then did you have instructions to go to this wreck?

A. Mr. Jeffords.

Q. I understood you to say yesterday that you had no instructions from him, and that you said you went with him?

A. He called me on the 'phone.

Q. Do you remember being asked that by Mr. Gunter?

A. I don't know.

Q. What did you go for?

A. To see what it would take to clear up the wreck.

Q. Did you have any instructions to examine the track?

A. Yes, sir.

Q. From whom?

A. Mr. Jeffords and Mr. Dean, and we all made a joint inspection.

[fol. 124] Q. Did you have any instructions to examine the track?

A. I don't remember, but we made a joint inspection.

Q. Did you have any particular definite instructions at that time to go there and examine the track?

A. I don't recall that.

Q. When you got there and did examine the track, you found a rail disconnected and shoved in the track?

A. Yes, sir, one rail was plum out, and the other one shoved in a little bit.

Q. Now, most of the spikes had been pulled out of both rails?

A. No, sir.

Q. You know how many had been pulled out of the second one you have brought into the case?

A. About eight spikes on the inside of the rail.

Q. Pulled out on the inside of one and on the outside of the other?

A. Yes, sir.

Q. And the one that was still there had been bent in, and the one where they were taken out on the outside had been pulled out?

A. Yes, sir.

Q. Where were the spikes that had been pulled out of the second rail?

A. They were laying in the track.

Q. You could see the heel of the bar where they had pulled them out?

A. Yes, sir.

Q. They were cleanly pulled out?

A. They were laying there.

Q. You got there before Mr. Dobson and Mr. Davies?

A. I couldn't say.

Q. You got there before daylight?

A. Around five-thirty (5:30).

[fol. 125] Q. Did you put that rail back and spike it down so that Mr. Dobson and Mr. Davies could see it?

A. No, sir.

Q. There was some change in the situation after you got there and before they got there?

A. I don't know when they got there.

Q. They got there about six o'clock?

A. I don't know.

Q. When did you get there?

A. About 5:30 I said.

Q. You stayed until after 6 o'clock?

A. I went back and got the wrecker.

Q. You saw the bolts piled up by the angle irons?

A. Yes, sir.

Q. Just as though the section hands had left them there?

A. No, sir.

Q. How would they leave them?

A. They would have carried them to the tool house.

Q. Do you want to add to the statement here that there was two rails involved or only one?

A. One rail was removed, and the rail east of that other had been seven or eight spikes pulled out, and that was the rail that had the wheel mark on it where something had hit it.

Q. Who was conductor of this train?

A. Mr. Timmerman.

Q. He is sitting over there by the rail?

A. I think that is him.

Q. Any doubt about that being him?

A. I don't know him personally.

Q. You don't know him?

A. He runs on the Atlantic Coast Line.

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[fol. 126] L. S. Jeffords was recalled as a witness for the defendants and testified as follows:

Direct examination.

By Mr. Gyles:

Q. You have been on the stand before?

A. Yes, sir.

Q. You are superintendent of the C. & W. C. Railway Co.?

A. Yes, sir.

Q. Have you any blue prints showing this place in question where the wreck is said to have occurred?

A. Yes, sir, I have a plan and profile.

Q. Have you examined this plan?

A. Yes, sir.

Q. Is this a substantially correct representation of the situation there?

A. Yes, sir, it is.

Mr. Gyles: We offer this plan or blue print in evidence.

(Blue print offered in evidence by the defendants, and marked by the stenographer as Exhibit Number four (4) in this case.)

Mr. Gyles (continuing):

Q. What is this?

A. Savannah River.

Q. What is this?

A. This is the four mile post, and this is the four and a quarter that Mr. Arrowsmith mentioned, and this is Beech Island in here.

Q. That is up on this end?

A. Yes, sir, this is Beech Island station, and that is nearly to Twiggs, and that represents the C. & W. C. Railroad between the Savannah River and Twiggs station, that is marked on there.

[fol. 127] Q. Can you tell the distance from the point of the wreck to Beech Island station by your mile post or anything else on there?

A. Yes, sir, I can give it to you accurately.

Q. What is it?

A. Approximately one and three-tenths (1 3-10) miles.

Q. From the place of the wreck to Beech Island station as shown on here?

A. Yes, sir.

Q. Now, we will show this to the jury and let them understand the situation—what end of the map is this?

A. The Augusta end.

Q. What is this?

A. Savannah River crossing.

Q. What is this?

A. It is the line of the track and indicating the curves and all that is in there.

Q. What point is this?

A. That is the point of the wreck.

Q. As we go on I see a curve in here—what is that?

A. A five degree curve to the left.

Q. Proceeding east?

A. Yes, sir.

Q. That is what?

A. Beech Island station, and it is 2.95 on the map.

Q. As you go on you come to another curve?

A. Yes, sir.

Q. How far does this line take you?

A. Nearly to the eight mile post.

Q. Where is the six mile post?

A. At the east track switch in Beech Island.

Q. Where is the seven mile post?

A. A mile further towards Ellenton.

Q. Is there a road crossing at Beech Island station?

[fol. 128] A. Yes, sir.

Q. This is the point of the wreck (indicating on the map to the witness)?

A. Yes, sir.

Q. What is the distance from the place of the wreck to Beech Island station, where the road crossing is?

A. It is one and three-tenths miles.

Q. Would it be possible for a man crossing at Beech Island station to look towards Augusta to the point of the wreck?

A. No, sir.

Mr. Arrowsmith: We object to that, as he has his map here, and it will show for itself.

The Court: Are you familiar with that country in there?

Witness: Yes, sir, I have been over it any number of times, Judge.

The Court: I think he can testify to that.

Mr. Gyles (continuing):

Q. Is it possible for a man crossing the track east, say, at Beech Island station, to look towards Augusta and see the point of the wreck?

A. No, sir, it is a physical impossibility on account of the curve.

Q. I want to ask you another question—now, what is the contour of the country between the wreck and Beech Island station, with reference to hills and anything else in there?

A. On the lower side it is in the swamp, and on the upper side there is a bluff of nearly fifty (50) feet high.

Q. What do you mean by the lower side?

A. On the right hand side.

Q. Going towards Ellenton?

A. Yes, sir.

[fol. 129] Q. Would that also obscure vision down the track?

A. Yes, sir.

Cross-examination.

By Mr. Williams:

Q. Put that pencil again on the map where Beech Island station is located?

A. This road crossing here.

Q. And you say it is how far from Beech Island station to the point of the wreck?

A. One and three-tenths miles.

Q. How far is it from Beech Island station to here (indicating on the map to the witness)?

A. To the curve?

Q. Yes?

A. It is 4,514 feet.

Q. What part of a mile is that?

A. Nearly a mile.

Q. It lacks three-tenths of a mile then of seeing up here to the point of the wreck—that is from where this curve is to up here?

A. It is about a half a mile as far as distance is concerned.

Q. It is nearly a mile from this point (indicating to the witness on the map)?

A. To where?

Q. To Beech Island?

A. Yes, sir.

Q. When Mr. Dobson said that there was a long straight track there, it is nearly a mile?

A. Yes, sir.

Q. Where is Beech Island?

A. Towards Ellenton from the wreck.

Q. Mr. Leech you say was working between the six and [fol. 130] seven mile post that?

A. Yes, sir, he said so.

Q. If Mr. Randall passed here, and saw him working down here, he would not have been between the six and seven mile post?

A. No, sir.

Q. The gravel pit is in here?

A. Yes, sir, west of the curve.

Q. It is on the left hand side of the road going out of Augusta?

A. Yes, sir.

Q. How far is that bank dug out from the railroad track?

A. In some places I guess it is three hundred (300) feet, but you cannot see the gravel pit from Beech Island station.

Q. I am not talking about that—a man can see about a mile from Beech Island down this way?

A. Yes, sir.

Q. And none of this part of the road is between the six and seven mile post?

A. Not a bit.

Q. Because that is on the other side towards Ellenton?

A. Yes, sir.

Redirect examination.

By Mr. Gyles:

Q. How far is it from Beech Island station to the six mile post?

A. It is 1,870 feet. It is a little over a quarter of a mile.

Q. Now, between Beech Island station and the place of the wreck here—where is the Dobson clay bed or pit—is it not on the Augusta side to where the wreck was?

[fol. 131] A. It is a few feet west of the wreck or almost opposite from the point of the wreck.

Q. You mean towards Augusta?

A. Yes, sir.

Q. What is the contour of the country between the gravel place and this curve?

A. There is a bluff there of about fifty (50) feet.

Q. Could anybody see around the curve?

A. No, sir.

Mr. Williams: We claim that Mr. Leach was working on this stretch (indicating on the map to counsel), and we make that statement to relieve your mind.

Mr. Gyles (continuing):

Q. What is that?

A. A profile indicating the grade between the Savannah River and this point.

Mr. Gyles: We offer this profile that the witness has just referred to, in evidence.

(Profile offered in evidence by the defendants and marked by the stenographer as Exhibit No. 5 herein.)

Mr. Gyles (continuing):

Q. Is it level all of the way from the river?

A. It is practically level from the river to Beech Island station.

Q. Where is the bluff?

A. On the left here.

Q. It is practically a level track there?

A. Yes, sir, from the river to Beech Island. This is the elevation here, and here is the Beech Island station (indicating on profile to counsel).

Q. What does this represent?

A. The ground through which the track runs, and it is level.

Q. What does this represent?

[fol. 132] A. It represents a cut through the hill, and it is right on the curve.

Q. This is no hill here?

A. No, sir.

Q. And another cut right here?

A. That is correct.

Recross-examination.

By Mr. Williams:

Q. This line here is the railroad tie?

A. Yes, sir, it is the top of the grade.

Q. That is the grade and not the direction to the road?

A. No, sir, the other plat has the direction.

Q. The conductor on the train there was who?

A. Conductor Timmerman.

Q. He was sitting over there?

A. Yes, sir.

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P. N. TIMMERMAN, a witness for the defendants, was called, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. How old are you?

A. I am 64.

Q. Where were you raised?

A. It was Edgefield County then, and it is Ridge Spring now.

Q. You are kin to Dr. Timmerman?

A. Half brother to him, yes, sir.

Q. Where did you learn railroading?

A. I went to work in 1892 on the Columbia yard for the Atlantic Coast Line.

[fol. 133] Q. What doing?

A. Switching on the yard.

Q. And you became a conductor?

A. Yes, sir.

Q. Since 1892 then you have been a railroad man?

A. Yes, sir.

Q. You were born at Ridge Spring?

A. I was born just about Edgefield Court House, but when I was six years old my father moved to Ridge Spring.

Q. How long have you been a conductor?

A. Twenty-two (22) years, and I was station master eleven or twelve years at Florence and at Columbia.

Q. You were the conductor on this train Number 38 that was wrecked?

A. Yes, sir.

Q. Where did you run from?

A. Augusta and Sumter.

Q. Your run was from Augusta to Sumter?

A. Yes, sir.

Q. What time did you leave Augusta?

A. My record shows I left at 2:51.

Q. That morning?

A. Yes, sir.

Q. Going towards Sumter?

A. Yes, sir.

Q. What coaches did you have in your train?

A. Seven cars. Two express cars and a combination mail and baggage car was the third car, and two coaches and two sleepers.

Q. Tell about your trip if you had any event before you got to the Savannah River?

A. No, sir, nothing occurred until we crossed the Savannah River.

[fol. 134] Q. Then what happened?

A. We were stopped suddenly, and I did not realize at first what it was, and I looked out the window and saw the cars. I was sitting on the right hand side of the train, and I saw the cars piled out, and I saw it by the light of the furnace door of the engine that had been thrown open, and I got out on the left hand side, and I had ascertained that nobody in either coach was hurt, and I ran to the engine to see about the engineer then, and I saw the fireman standing by the engine, and I asked if he knew where the engineer was, and he said he did not, and I got as close to the engine as possible and the steam was blowing across the track, and I called him and there was no answer, and the baggage master and I went back and crossed over and went on the swamp side, and went in the swamp to our knees in mud, and we could not get to the engine, and the express messenger, who was in the further car, had climbed out, and was standing on top of the car, and he could see under the steam of the engine the body of the engineer lying in there, and the steam was dying down considerably then, and we got in this hole by the engine and pulled him out.

Q. You sent his body to Augusta?

A. Yes, sir, we brought it with the cars to Augusta.

Q. After that, did you try and see what was the cause of the wreck?

A. Yes, sir.

Q. What?

A. I found a rail disconnected, the angle bars off, and the bolts taken out, and with the nuts screwed off first, and the spikes pulled on one side of the rail, and that rail was disconnected, was shoved forward about eight or ten feet, and I think about ten feet, but I had no way of measuring it.

[fol. 135] Q. Was that rail lying on the end of the cross ties?

A. Yes, sir, and I could not see the front end of the rail, as it was under the mail and baggage car.

Q. Why do you state that the nuts and bolts had been removed?

A. The nuts and bolts were taken out and lying on the ground, and the angle plates were out and lying on the ground also.

Q. What was the name of your fireman?

A. Charlie Josey.

Q. Where is he now?

A. I understand he is either in a sanatarium or a hospital for the insane. I have not seen him in a couple of years, and I am not positive about that.

Q. He worked up to the time that you saw him?

A. Yes, sir, up until about two years ago, and he had some kind of a fit on his engine one night, and I have not seen him since. I sent for a doctor for him then, and I have not seen him since.

Cross-examination.

By Mr. Williams:

Q. How long have you been knowing Mr. Temples?

A. About eighteen years.

Q. Did you and he go to work about the same time for the railroad company?

A. No, sir, I went to work before he did.

Q. He had been working for the Coast Line about eighteen (18) years?

A. I don't remember that, but when I first knew him he was working on his father's farm right outside of Florence.

Q. How many rails had been tampered with?

A. I didn't see but one, but I didn't stay there at all.

[fol. 136] Q. You left?

A. Yes, sir.

Q. One had been tampered with?

A. Yes, sir, and that was enough.

Q. There would not have been any necessity to tamper with two—there would have been no chance of a train passing over the track with one rail out?

A. There was no chance of a train passing over the one I saw.

Q. When the wreck occurred you looked for the engineer and the fireman?

A. Yes, sir.

Q. You found the engineer with his head cut off?

A. No, sir, his head was split open.

Q. The cab caught fire?

A. I don't think so. The cab was torn up when the engine rolled over, and it left the wooden part in the hole where it landed first.

Q. Did you see Mr. Temples after that night?

A. I brought him to Augusta.

Q. He was not burned?

A. No, sir, no sign of burning.

Q. Was Mr. Temples scalded?

A. I don't think so.

Q. Didn't hot steam come out?

A. I don't think that the steam was striking him, because I went in the hole and pulled him out, and was the first man to put my hand on him and while his clothes were a little damp I didn't see any sign of a scald.

Q. That derailment took place immediately where that rail was taken out?

A. Yes, sir, right where the rail was disconnected.

Q. It didn't go and hit the next one?

A. I cannot say about that.

[fol. 137] Q. You saw those bolts?

A. Yes, sir.

Q. Where were they?

A. Lying in the track.

Q. At the ends of the cross ties and some others on the cross ties?

A. They were lying I think between the cross ties if I remember right.

Q. Suppose you had been asked this question before by the Solicitor, and you said that they were at the end of the cross ties and some were on the cross ties?

A. That has been a good long time ago, and the bolts were lying out there, and under the stress of the time I don't know that I could tell the exact point they were lying, closely in the vicinity of the rail joint. I don't know that I could say exactly.

Q. How much of the rail could you see that was disconnected there?

A. About fifteen feet of it.

Q. The rest was covered by the wreckage?

A. Yes, sir.

Q. And that was the disconnected rail?

A. Yes, sir.

Q. Were those spikes moved from the outside or the inside of the rail?

A. From the outside.

Q. The rail was pushed out?
A. It was not off of the cross ties.
Q. It didn't go to the inside?
A. No, sir, it was outside.
Q. It was pushed out?
A. Yes, sir.
Q. Were the spikes disturbed on the inside at all?
A. No, sir.
[fol. 138] Q. They were not?
A. No, sir.
Q. Are you sure you are right about that?
A. I made a statement before the Interstate Commerce Commission the day after the wreck, and that is the way I had it then.
Q. About how much out of line was the rail at the end that you could see?
A. Eight or ten inches or possibly twelve inches, and it was pushed forward eight or ten feet.
Q. It was out of line and pushed forward?
A. Yes, sir.
Q. Did the wheel strike the rail?
A. I didn't examine the rail to see if it struck it or not, but the marks were on the ties.
Q. If others said that it did strike it just to the left of the center of it you would not deny it?
A. I could not say one way or the other.
Q. You don't know whether it struck it or not?
A. No, sir, I could not say.
Q. Didn't you tell Mr. Gunter that it didn't touch it or didn't strike it?
A. I expect it is right.
Q. If others say that they saw where it was hit on the end, then you are mistaken or they are one?
A. Every man has his own opinion.

Mr. McKay: There has been no testimony as to a mark on the rail that Captain Timmerman is talking about now.
The Court: Well, this is on cross-examination.
Mr. Williams: I never heard of but one rail until this morning. We proceeded on the one rail theory yesterday.
Mr. Williams (continuing):

[fol. 139] Q. I will ask you this question—was the disconnected rail the one that you said that the wheel did not touch?

A. Yes, sir.

Q. The wheel didn't touch that at all?

A. I could not see any signs of it.

Q. It didn't touch it?

A. I didn't see any sign.

Q. Did you see any rail that the wheels had hit?

A. I didn't look at any other rails.

Q. Did you notice any tracks?

A. No, sir, I didn't stop to look for any.

Q. Let me refresh you again—some witness said that he saw two tracks that went off to a place where the crow bar was found—didn't you say that you didn't notice any tracks—and that you did look for some, but you could not tell anything about it because the passengers were running around?

A. I don't remember it, I say.

Q. You don't deny it.

A. I don't remember.

Q. I want you to admit it if you said it?

A. I don't remember whether I saw any or not.

Q. Did you look for any?

A. I don't recall whether I looked for any tracks or not. I don't remember, I say.

Q. You will not say then whether you will deny this or admit it?

A. I said I don't remember it.

Q. Was that rail bent at all?

A. I could not see any.

Q. You couldn't tell about that?

A. I could not see any bend in it. Part of it was concealed and the end that I saw was not bent.

Q. Were the spikes taken out on the inside or on the [fol. 140] outside?

A. On the outside.

Q. Did Mr. Stansfield ask you on cross examination before in the criminal trial—were all of the spikes there—and didn't you say then they were taken out on the inside and the outside was in proper position—and you said yes—did you say that the other rail was pushed in?

A. It was pushed ahead.

Q. You say now that the spikes were taken out on the outside of the rail and that the rail was pushed out?

A. Yes, sir.

Q. You said that the end pointing to Augusta was not bent out—you said it was pulled out—and you said all of the spikes were there and were taken out on the inside, and the question was asked then if the rail was pushed in——

A. I don't recall saying that and if I did I made a mistake then.

Q. That is on page nine of this record?

A. I don't know.

Q. If you said that, the mistake that you made was just the opposite?

A. Yes, sir, I don't recall saying that, and as I say if I said it I was mistaken.

Q. Now, was there any chance of that rail having been—was there any chance of it having been bent in just a little, and a spike taken up and then driven down in the tie to hold it just a little?

A. I didn't see it.

Q. You didn't see that?

A. No, sir.

Q. It was not that way?

A. No, sir, I said that the rail was pushed forward about ten feet from the joint.

[fol. 141] Q. Was that rail, where it was disconnected, pushed in from one to three inches, and a spike drawn and driven in it?

A. No, sir, I didn't see that.

Q. Was such as that there?

A. I didn't see any.

Redirect examination.

By Mr. Gyles:

Q. You stated the thing as you saw it that night?

A. Yes, sir.

Q. Where Mr. Temples was lying—what was the character or kind of ground he was lying on?

A. The engine turned over on a fill, and when it struck the soft side of the fill it made quite an impression on the ground, and the fragments of the cab were left there, and the engine turned on and left it, and it fell at such an angle that all of the steam from the safety valves were blowing about where he was lying and across the track.

Q. Was or not he lying in the debris?

A. Yes, sir, and on the roof of the cab or right beside it.
Q. There was no steam striking him then?
A. No, sir, no steam was striking him when I saw him.

Recross-examination.

By Mr. Williams:

Q. Your idea is that what killed him was his head being split open?
A. Yes, sir.
Q. And not scalded and burned?
A. No, sir.

Redirect examination.

By Mr. Gyles:

Q. This wreck occurred in May, 1921?
[fol. 142] A. Yes, sir.
Q. On the morning of May 20th, 1921?
A. Yes, sir.
Q. And this trial of Rivers was out in 1922, and in May some time?
A. Yes, sir.
Q. You testified here then?
A. Yes, sir, I did.

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E. W. STANTON, a witness for the defendants, was called, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. What is your position?
A. I am with the Atlantic Coast Line.
Q. Were you flagging then?
A. Yes, sir.
Q. In May, 1921?
A. Yes, sir.
Q. Were you on train Number 38?
A. Yes, sir.
Q. What is your position now?

A. I am with the maintenance department of the Atlantic Coast Line.

Q. Where were you raised?

A. Bennettsville, S. C.

Q. When did you first take up railroading?

A. In Florence.

Q. You have been railroading ever since?

A. Yes, sir.

Q. You were a flagman at the time?

[fol. 143] A. Yes, sir.

Q. Tell what you saw and did that night at the wreck?

A. Right after we crossed the river we came to a sudden stop, and I was sitting in the coach with Capt. Timmerman at the time, and he was on the right hand side, and I was on the left hand side, and I ran out on the platform and saw what had happened, and Captain Timmerman was right behind me, and I went to the engine and didn't see anybody and knowing that something might be coming out behind me I went across the river to the yard office to make a report of the wreck.

Q. How far was it to the yard office?

A. Between three and a half and four miles back to the yard office.

Q. Did you look at the condition of the track?

A. Yes, sir, when I got back.

Q. What did you find?

A. Some angle bars and one of the rails disconnected.

Q. Describe that?

A. The taps and bolts had been taken out and were down by the track, and if I recall the bolts were on the inside of the track and thrown down.

Q. You saw them there?

A. Yes, sir.

Q. What about the angle bars?

A. The angle bars were on the ground about the end of the ties on the outside, and the rail was shoved up six or eight feet or something like that.

Q. Was the rail on the ties?

A. Yes, sir, on the end of the ties, and it seemed to be out about ten or twelve inches.

Q. Did you see any spikes there?

A. Yes, sir.

Q. Where were they?

[fol. 144] A. I don't recollect where they were on the ties or down between the ties.

Q. None of them were in the holes in the cross ties?

A. Not that I saw.

Q. What was the character of the holes as to being clean or mashed?

A. They appeared to be pulled up clean from what I could see, but I could not see one end of the rail, and the rest of the ties were damaged so I could not see.

Q. The spikes were inside of the holes or outside?

A. Outside.

Q. Were they clean holes?

A. Yes, sir, they were.

Q. Did you see the Southern Railway tools that have been testified to?

A. No, sir, I didn't see those.

Cross-examination.

By Mr. Williams:

Q. I believe just before they found the engineer that you went to Augusta to report the wreck?

A. Yes, sir, before they found him.

Q. You didn't see the position he was in?

A. No, sir, they had him on the track when I got back.

Q. How long were you gone?

A. About forty minutes they say.

Q. Was the rail pushed out that you saw?

A. Yes, sir, about to the end of the ties, and it was out about a foot.

Q. Did you see where any spike had been removed and driven a little further in?

A. No, sir, I did not.

Q. You didn't see where one spike had been drawn from [fol. 145] the rail, and the rail pushed in a little, and the spike driven down?

A. No, sir, I didn't notice that.

Q. If that was there you didn't see it?

A. No, sir.

Q. When you were a witness here before you had the engineer's grip with you?

A. The Company had it, I think.

Q. Where is that grip?

A. I have not seen it since the trial.

Q. You had it here?

A. No, sir, I did not.

Q. Somebody held it up and said is that thing Engineer Temple's grip, and you said yes, sir?

A. Yes, sir, he didn't hold it up, but he had it there with three or four others, and identified it.

Q. You identified that grip?

A. Yes, sir.

Q. You had seen his grip pretty often?

A. Yes, sir.

Q. The grip you identified here, you said was his?

A. Yes, sir.

Q. That was in your testimony before?

A. Yes, sir.

Q. Where is that grip now?

A. I have not seen it since.

Q. I don't believe at the other trial that you said anything about inspecting the rail?

A. I think it is in there.

Q. You didn't go into it very strong?

A. Only what they asked me.

Q. You didn't say much about it?

A. Only what they asked me.

Q. Your main business before was to identify the grip?

A. No, sir.

[fol. 146] Q. That is what they put you up for?

A. I don't know, but they put me up about the train being wrecked.

Q. Didn't you say this—didn't they ask you: Did you see the engineer's grip before you left; and didn't you say "No, sir"—and then you said that the track had been moved out of place, and there was prints on the ties where spikes had been pulled apparently—and then he asked you to identify the bag?

A. Yes, sir.

Q. That was your testimony?

A. Yes, sir.

Q. And you have not got the bag now?

A. No, sir.

Q. Where is it?

A. I don't know.

Q. It is not here?
A. I don't know; I haven't got it.

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A. W. ANDERSON was called as a witness for the defendants, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. Colonel, you have been in the service of the railroad for some time?
A. Yes, sir, 44 years with this road.
Q. What road are you with?
A. Charleston & Western Carolina Railway Company.
Q. What is your office?
A. Vice president and general manager.
Q. Where do you live?
[fol. 147] A. Aiken County. In North Augusta.
Q. That is where your home is and your family?
A. Yes, sir.
Q. Where were you born?
A. In Laurens County.
Q. You are a cousin of Chief Justice Watts?
A. My mother was a Miss Watts, and the sister of Wash Watts, a well known farmer in Laurens County.
Q. How did you start railroading?
A. As operator and agent at Laurens.
Q. You have been with the railroad ever since?
A. Yes.
Q. And have gone on up by hard work?
A. Yes.
Q. How long have you been railroading?
A. Well, about forty-six (46) years. I started to work for the old Laurens railroad that ran in from Newberry to Laurens in 1882, and I believe it was April 22nd, if I recall correctly.
Q. Do you remember the day of the wreck?
A. I remember the wreck, but not the date.
Q. Did you go out to see that wreck?
A. Yes, sir, as soon after daylight as I could see the situation I went to examine and see what caused it.

Q. Tell what did you find to be the cause of the wreck?

A. I found that one of the steel rails about thirty feet long——

Mr. Williams: Just let him describe what he saw there.

Witness: I found a thirty foot rail, which was a standard length at that time, weighing eighty (80) pounds to the ten foot section, had been removed from the track, and that the angle bars that fastens that rail to the rail on either side of it, and the bolts had been removed, and the spikes [fol. 148] on one side of the rail had been removed, and the rail itself was pushed forward several feet, and possibly six or eight feet. I didn't measure it. The rear end of one of the cars on the front end of the rail had mashed the end down, and that end of the rail was obscured and not removed from under the car. I was particularly struck with the fact that there appeared to have been no effort on the part of whoever moved the rail to hide the fact that the rail was out of place. If the rail had been in place, or just out of place, I could have understood what the fellow was after, but whoever did it was pretty bold. The condition of the rail was out of line. The evidence was there where the engine had struck the cross ties after getting off of the end of the good rail, and four or five cars were still on the track. One of the cars was down the bank, and part of one of the cars was down, and part on the track if I recall correctly. The condition of the rail that had been removed was in good condition, and there was nothing the matter with the rail. I examined it to find out if there were any defects, and I examined the angle bars and bolts, and they were in good condition.

Mr. Gyles (continuing):

Q. Did you notice the holes that the spikes came out of as to whether they were clean or not?

A. Possibly I did, but I don't recall now, as it has been seven years ago.

Q. That was in May, 1721?

A. Yes.

Cross-examination.

By Mr. Williams:

Q. You got there about what time in the day?

[fol. 149] A. Early in the morning.

Q. What time?

A. Six or seven or eight, or along there.

Q. When you got there you could see the length of the rail?

A. There was part I could not see. I said that. That was under the truck of the car, and it was mashed down so you could not see it, but I saw about twenty or twenty-five feet.

Q. The spikes were taken out of the inside or on the outside?

A. My recollection is that the spikes were taken up on the outside, and the rail was on the outside.

Q. Your idea is that those two cars and the engine that had passed over the rail did not disturb the rail?

A. The rail was pushed forward eight or ten feet, but I could not say what caused it.

Q. What information could you give us as to how it was when the wreck occurred?

A. I am telling how I found it.

Q. But you don't mean that it was that way before the wreck occurred?

A. No, sir, I don't think it was. It was on the outside of the line of the two rails, and had evidently been placed outside.

Q. Didn't I understand you to say that what struck you was that there was no effort to conceal that the rail was pushed out?

A. Yes, sir, and I will go into that if you say so.

Mr. McKay: That is what my friend objected to a little bit ago.

The Court: Yes, sir.

Mr. Williams (continuing):

Q. Your opinion is that the rail was driven down the [fol. 150] road by the engine?

A. I could not say about that.

Q. How about the end of the rail being hit with the wheel?

A. I saw no evidence of any abrasion.

Q. That was the only rail that was out of line or tampered with?

A. Yes, sir, and the angle bars had been taken out of the other two rails.

Q. The angle bars go on the side of the rails to hold them together?

A. Yes, sir.

Q. They had been taken off and laid aside?

A. Yes, sir, and that is why I was struck with the fact that the man didn't want to conceal it.

Q. It was done like any section man would take it off if he wanted to?

A. It must have been a crazy section man to do that.

Q. But it was taken off like any section man would take it off?

A. The section man would take it off with a wrench, but he would not take it off and lay it aside and then go off and leave it.

Q. If he wanted to take it off he would have to unscrew the bolts?

A. That was the only way for him to take it off.

Q. Then it was taken off like a section man would take it off?

A. It is absurd to say that a section man would do it. It is an awful crime.

Q. Don't you think it is an unusual crime?

A. I have heard of cases of it.

Q. He got the wrench from the Southern Railway Company you all say?

[fol. 151] A. It was a Southern wrench.

Q. Don't you think it was unusual for anybody to do that?

A. I do not.

Redirect examination.

By Mr. Gyles:

Q. How far is it from the Southern yards at Hamburg to the place of the wreck?

A. About four miles.

Q. The rail that was pushed forward—was or not the further end of that under wreckage?

A. Yes, it was.

Q. And the rail parallel to that—was or not that under the wreckage?

A. Yes, sir, the most of it was.

Q. Were you under there examining them?

A. No, sir, I was only interested in finding the cause.

Recross-examination.

By Mr. Williams:

Q. How many bolts were taken out of the rail?
A. All of them.
Q. How many spikes were taken out?
A. I think all of them were taken out?
Q. Could you see?
A. Yes, sir, you could see.
Q. Some said that it was half covered with wreckage?
A. I don't think that is correct.
Q. You think that whoever said that was wrong?
A. Yes, sir, I do.
Q. Don't you know that the conductor and others said that half of the rail was covered with wreckage?
A. I have told you that it was covered by the end of the car ahead of it.
[fol. 152] Q. You could see under there all right?
A. No, sir.
Q. Then you said all of the spikes were taken out?
A. Yes, sir, of the rail that was removed.
Q. When you got there at 6 o'clock?
A. I didn't say it was 6 o'clock when I got there, but I said it was after daylight.
Q. Was any part of the rail covered with wreckage?
A. Yes, sir, and probably ten feet or more was.
Q. Was the spikes taken out of that part?
A. There were taken out at the other places where the rail was originally laid.
Q. There was no wreckage over that place at all?
A. There was not.
Q. He had gone on past that place?
A. Yes, sir, and the cars gone down the bank.
Q. And carried the rail with it?
A. No, sir, it may have been put there originally. I don't know.
Q. Could you or not see all of the rail that had been tampered with?
A. No, sir, I could see all of the place where it originally lay. This rail was out of place, and there was a gap of thirty feet.
Q. That there was no wreckage on?
A. Yes, sir.

Q. The engine and other cars had broken loose?

A. Yes, sir, and the front car was entirely down the embankment.

Q. And this entire rail was clear?

A. Yes, sir, and I could see along there.

Q. And if any of them said that they could not see a part of it because it was under the wreckage—then that is incorrect?

[fol. 153] A. Yes, I think so.

Redirect examination.

By Mr. Gyles:

Q. You saw the spikes?

A. I saw no evidence of spikes drawn from the rail that was in front of the one removed.

Q. I want you to make clear as to spikes being out of cross ties where the rail came from?

A. I will take this track arrangement and show you (indicating to counsel and the jury). This is going towards Florence, and here is the track. This rail had been removed entirely, and the bolts taken out here, and the angle bars, which are heavy pieces of material, had been set to one side, and this rail was in this position somewhat, and the engine was down the track up here and down in the cut, and this car was also, and then the second car I think it was partly down the cut, and the end here was mashed in by the trucks so you could not see that end of it, and the spikes here were taken out on the outside, or that is my recollection. My recollection is that the spikes had been removed on the outside, and this rail had been removed. Now, this rail was in perfect line up here, and this one here—and the cars were standing on it.

Q. This other rail that runs from here to here (indicating to the witness) was not tampered with?

A. Yes, sir, and as far as I know this rail that was removed is in the track there right now. It was a comparatively new rail at the time of this wreck.

Q. Do you remember where the angle bar and bolts were lying?

A. No, sir, I would not like to say, but on one end there was a pile of them.

[fol. 154]. Recross-examination,

By Mr. Williams:

Q. When you got there you found this rail in this shape (indicating to the witness)?

A. Yes, sir.

Q. There was some wreckage there?

A. Yes, sir, and I could not see that end of it (indicating with small line of track to counsel). Whether it was five or ten feet or more I could not say.

Q. You found that this was in this position, and the spikes up here, and no spike put in here (indicating)?

A. No, sir, absolutely not.

Q. So much of this rail was under the wreckage that you could not tell whether the spikes were out or not?

A. This rail was here (indicating), and these spikes were taken out, and I know it was that way when I saw it, and I cannot say whether the train knocked it that way or not.

Q. At this end here (indicating to the witness), the devilment was supposed to have been done?

A. Yes, sir, all along the rail.

Q. The end towards Augusta was disconnected?

A. Yes, sir.

Q. And you didn't see where it had been pushed in just a little bit and spiked down?

A. No.

Q. I am speaking of the end towards Augusta?

A. No, sir, the first indentation of the cars struck the rail along here (indicating to counsel and the jury.).

Q. On the end towards Augusta, did you see where the flange of the wheel had struck it slightly to the left of the center of the rail?

A. No, sir, I did not.

Q. You didn't see where any flange struck the end of [fol. 155] the rail and dented it?

A. No, sir, and the rail is in the track there now.

Q. Those little wheels on the front of the engine—did they go down the bank with the engine?

A. My recollection is that the whole engine went off.

Q. They call that the pony trucks?

A. Yes, sir, and I was not interested in that because we have experts to figure on that, but I was there to examine the cause of the wreck.

Examination by Mr. McKay:

Q. Are you employed by the Atlantic Coast Line?

A. No, sir, the Charleston & Western Carolina Railway Company, and we lease the right to the Atlantic Coast Line to run over our track.

Q. State whether you were here yesterday?

A. I was not here yesterday. I was in Spartanburg yesterday.

Q. State whether or not you made any inspection to see whether this rail—which is the rail just to the east of the rail that you have been testifying about, had been tampered with and had been removed?

A. It had not been removed.

Q. Could you see whether or not that rail had been pulled over to the middle of the track and spiked there?

A. No, sir, that rail was exactly in place and in line, and the only thing that had happened to that rail was that the angle bar had been removed, and the bolts taken out, and that rail was in place and spikes and all as far as I could see.

Q. As a practical railroad man state whether or not one rail was sufficient to derail the train?

A. It not only was, but it did.

[fol. 156] Recross-examination.

By Mr. Williams:

Q. Did you know that one of the witnesses said that it came near not doing it?

A. I did not hear that.

Q. He said that the engine went over and hit one end of the rail?

A. I didn't hear that.

Redirect examination.

By Mr. Gyles:

Q. What is this, Mr. Anderson?

A. This is the angle bar, and the rails on each end are connected here (indicating to counsel and the jury). They

come in the middle here, and of course that rail had six bolts in it the same as this one, and we have only four now, but that is immaterial, and these bolts were taken out in both ends of the rail, and the bars laid aside, and the same thing was done here, and the bolts were removed and lying there, and that joint connected that way experts feel is as good as the solid rail.

Q. These angle bars are too close together as they are now shown?

A. Yes, sir, the flange of the rail is about one-half, and the top of the rail would be about like this (indicating to counsel and the jury), and the space between the two is one-half to three-quarters of an inch wide.

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U. H. Gantt, a witness for the defendants, was called, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. How old are you?

[fol. 157] A. Forty years old.

Q. Where do you live?

A. Augusta.

Q. Where were you born and raised?

A. About eight miles from Wagener.

Q. In Aiken County?

A. Well, in Lexington County.

Q. Who was your father?

A. Crumbull Gantt.

Q. Who was your mother?

A. Priscilla Lucas.

Q. Where did you start with the railroad?

A. At Pelion for the Southern Railway.

Q. In May, 1921, where were you?

A. Living in Augusta.

Q. What doing?

A. Handling the main line of the Southern from Augusta to Warrenville as section foreman. I had six miles from Hamburg in my section.

Q. What do you work with?

A. I supervise a force that works with tools.

Q. You have in your possession tools, etc.?

A. Yes, sir.

Q. What comprises tools?

A. Wrench like that over there, and crow bars and picks and things of that kind.

Q. Do you remember the time of this wreck?

A. Yes, sir.

Q. Do you remember the date of it?

A. Yes, sir; May 20th, 1921.

Q. Now, I want to know if you missed any of your tools the morning of that date?

A. Yes, sir.

Mr. Arrowsmith: I object to that. I can see no pos-
[fol. 158] sible relevancy of the question, or any probable answer that might be made to it. The Southern Railway Company asked whether or not it lost tools has nothing to do with it.

The Court: I will let it in for the present.

Mr. Gyles (continuing):

Q. What tools did you miss?

A. Claw bar and a wrench.

Q. What is the bar used for?

A. To draw spikes.

Q. What is the wrench used for?

A. To take off the nuts.

Q. Where did you have the tools?

A. In a tool house.

Q. Where.

A. Near the east end of the Hamburg yard.

Q. When did you put them up?

A. The evening before.

Q. Was the toolhouse locked?

A. Yes, sir.

Q. What did you find the next morning?

A. At the back end of the tool house it had weather boarding up and down, and somebody had taken an auger and bored up and down there until they could take that board off, and I missed the claw bar and the wrench.

Q. When did you next see those tools?

A. In an office on Broad street.

Q. In the office of the C. & W. C. Railway Company?
A. Yes, sir.
Q. They were delivered to you then?
A. They were shown to me.
Q. Did you identify them?
[fol. 159] A. Yes, sir.
Q. Who delivered them to you?
A. Mr. Dorsey, I believe.
Q. Did you know where they came from or had been found.
A. I only heard that they were found at this wreck——

Mr. Busbee: We object to what he heard, and move to strike it out.
The Court: Yes, sir, he cannot tell what he heard.

Mr. Gyles (continuing):

Q. What was the condition of the tools then, and especially the wrench—was it all right?
A. Yes, sir.
Q. Were you here at the criminal trial?
A. Yes, sir.
Q. Did you see the tools here then?
A. Yes, sir.
Q. Whose were they?
A. Southern Railway tools, and they had been in my charge.
Q. On your section?
A. Yes, sir.
Q. You say that they were missed the morning of the wreck?
A. Yes, sir.

Cross-examination.

By Mr. Williams:

Q. They got into your tool house by boring into it?
A. They bored across one hole right after the other until they got in.
Q. How big were the holes?
A. About a seven-eight-s (7/8) of an inch bit was used, [fol. 160] I think.

Q. That was how many miles from the place of the wreck?

A. I judge about four miles.

Q. It is not on the same line of railroad?

A. No, sir.

Q. A fellow to get from the tool house of yours to the C. & W. C. tracks would have to go how?

A. I am not familiar with the roads in there.

Q. The C. & W. C. crosses another trestle?

A. Yes, sir.

Q. A fellow would have to go to Augusta and get on the C. & W. C. track and cross another bridge, or he would have to go on the high lands of Aiken County and go across and hit the C. & W. C. from Augusta.

A. Yes, sir.

Q. And before he got in and got your tools, he would have to get a 7/8 of an inch auger and bore through your tool house?

A. Yes, sir, there could have been other ways.

Q. The C. & W. C. Railway Company uses the same kind of tools you all use?

A. I don't know.

Q. Your wrench is similar to this one?

A. Yes, sir.

Q. And this one has A. C. L. on it?

A. Yes, sir.

Q. That is the Atlantic Coast Line?

A. Yes, sir.

Q. That is one of the same things?

A. Yes, sir, that looks like what we use.

Q. Yours was an eighty (80) lbs. wrench?

A. Yes, sir, it had eight pounds material.

Q. It had eighty pound material?

[fol. 161] A. Yes, sir, it handled eighty pound material.

Q. Where is that claw bar?

A. I never did get it from the court.

Q. It is pretty good for one man to work with?

A. Yes, sir, it is pretty heavy.

Q. It has to be so heavy that it will help you in pushing down on it?

A. The weight of it has something to do with a man working on it.

Q. You don't know where the tool houses are of the
Q. That is the Atlantic Coast Line?
A. I do not positively.
Q. You don't know where the section house is of the C. & W. C. and the Coast Line?
A. No, sir, I don't remember that.
Q. Your tool house is in Hamburg?
A. Yes, sir.
Q. If you were leaving your tool house to go to a mile of Beech Island station, which way would you go?
A. There is a road that leads up the river, and it may be a hay farm road, but to take a chance I might see if I could go through there.
Q. You could reach it that way in four or five miles?
A. I don't know. I have never been through there.
Q. Don't you know that Beech Island is about six miles from Hamburg?
A. I don't know that.
Q. You don't know the weight of a claw bar?
A. No, sir, not exactly.
Q. About how much would it weigh?
A. About thirty or thirty-five pounds.
Q. It weighs less than one of the wrenches?
A. No, sir.
Q. How much does the wrench weigh?
[fol. 162] A. I didn't know. I never did weigh it.
Q. One of them said that the wrench weighed eighty (80) pounds.
A. I don't know. When he said eighty (80) wrench, I imagine that he was referring to eighty pound material that it would handle and take off.
Q. Is this the kind of wrench that you had (indicating to the witness)?
A. That is about the size.
Q. Your claw bar runs out this way?
A. It will run about five feet long.
Q. It has a heel on it down here?
A. Yes, sir.
Q. And it is a good deal heavier than this?
A. Yes, sir.

Redirect examination.

By Mr. Gyles:

Q. The wrench that you had—would it fit loosely or snugly the bolts on the C. & W. C. railway track?

A. It would fit, but not snugly. It would cut the corner some.

Q. When you refer to an eighty (80) wrench, in railroad parlance what do you mean?

A. I may be a slang way, but we mean it will handle bolts of an eighty pound material, and when we say a sixty pound wrench we mean it will handle sixty pound material.

Q. Your wrench is related to the material and not as to the weight of the wrench?

A. That is right.

Recross examination.

By Mr. Williams:

Q. Your wrench was an eighty pound wrench?

[fol. 163] A. Yes, sir.

Q. When Mr. Anderson said that the rail that they had out—that it was an eighty pound rail,—your wrench was the kind to handle that material?

A. Yes, sir.

Q. And whether the wrench fit snugly or not is another question?

A. The wrench that I had was considerably worn and that was the reason of it.

Redirect examination.

By Mr. Gyles:

Q. The tools you saw here, with the letters of the Southern or the marks of the Southern on them—were they the tools you mentioned?

A. Yes, sir.

Q. They were your tools?

A. Yes, sir.

Recross examination.

By Mr. Williams:

Q. And you have never been able to get them back?
A. No, sir.
Q. You don't know where they are?
A. No, sir.

Redirect examination.

By Mr. Gyles:

Q. How long have you been in the railroad business you say?
A. I have been in the railroad business about fifteen years now.
Q. What is your position now?
A. Section foreman.
Q. For how long?
[fol. 164] A. Nearly twelve years.
Q. What is your custom as to making inspections of tracks?

Mr. Busbee: We object to that because this witness is in the employ of the Southern Railway, and this is a suit against the Atlantic Coast Line Railroad, and he is working for a different railroad, and it has not been shown that there is any universal custom or one that is common to all railroads in effect.

Mr. Gyles: We are trying to show the custom of railroads in this section.

The Court: I can see where it would be competent.

Mr. Gyles (continuing):

Q. State your custom in inspecting railroads down in this section?
A. We at all times inspect the track when we are going to and from our work, and we keep a close watch out for something that may have been wrong, or gone wrong since we came in or out, and part of our territory if we don't get over it for a couple of days we patrol it.
Q. Do you take your hands and go over your entire section every day?
A. Not every day.

Q. How about road masters and others riding on the motor cars and trains?

A. They are continuously at that.

Q. Do you go over a piece of track every day?

A. No, sir.

Q. So that you know the condition of your road is what you are after?

A. Yes, sir.

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[fol. 165] W. R. Dobson, recalled as a witness for the defendant and testified as follows:

Direct examination.

By Mr. Gyles:

Q. I want to ask you about the tools,—there is some question as to whether they were found by you on the day of the wreck or later?

A. They were found the afternoon of the wreck?

Q. The afternoon of the same day of the wreck?

A. Yes, sir.

Q. Did you see these tools later in the office of the C. & W. C. Railway Company in Augusta?

A. No, sir, I saw them here at the Court.

Q. The tools you saw here were the same ones that you found?

A. Yes, sir, with the same marks.

Q. Were they identified by the Southern Railway as theirs?

A. Yes, sir.

Q. Did those tools have any marks on them?

A. Yes, sir, they had Sou on there, and they seemed to be Southern Railway tools.

Q. Now, you know where the Beech Island railroad crossing is?

A. Yes, sir.

Q. I will ask you the condition of the road from there to the place of the wreck, and whether or not a person crossing the railroad at Beech Island could see the point of the wreck or near it?

A. No, sir, they could not see any ways near it.

Q. Why?

A. On account of a bluff and curve.

Q. Why?

[fol. 166] A. The railroad follows the swamp around and goes not go up the hill.

Q. The hill is on the right hand side going to Augusta?

A. Yes, sir, and there is trees and growth on it.

Q. Does or not that bluff come close to the railroad or how?

A. At some points it is right to the railroad, and other points it has been dug out by the railroad company, and that makes it further back. It was all originally at the railroad, but some has been removed.

Q. How is it now?

A. Some close to the railroad and some dug out?

Q. Do you know where Mr. Randall's farm was?

A. Yes, sir.

Q. Do you know where that Beech Island station crossing is?

A. Yes, sir.

Cross examination.

By Mr. Arrowsmith:

Q. For about a mile from Beech Island back to the wreck is a straight track?

A. Yes, sir, it looks to be nearly a mile.

Q. There is nothing to obstruct the view down the track?

A. No, sir, it would be open for practically a mile.

Q. Was there any more than one rail involved at the scene of this wreck?

A. Torn out?

Q. Yes.

A. I should think so. What I saw it looked like three or four rails pushed out.

Q. That is, the trucks of the train had disarranged the whole roadbed?

[fol. 167] A. Yes, sir.

Q. With respect to the rail out of alignment—would you say whether of not the angle bars had been taken off of both ends of the particular rail?

A. My idea was that those things were taken off of just one end, and I didn't see the other. I thought the other end was connected, but I didn't examine it.

Q. That is from what you could see?

A. Yes, sir.

Redirect examination.

By Mr. Gyles:

Q. You say one rail was out?

A. Yes, sir.

Q. Was that rail pushed ahead?

A. It seemed like it was down some from its position.

Q. The end that was pushed ahead was under the wreckage?

A. I just thought that was done by the train pushing it out of line.

Q. The end of the rail towards Augusta?—what about the angle bars there?

A. They were off.

Q. But the rail ahead of that, and the one that was out and pushed ahead, you didn't examine that at all?

A. No, sir.

Q. You don't know the condition of that then?

A. No, sir.

Recross examination.

By Mr. Arrowsmith:

Q. The rail that was out of line, was that or not the rail that had the injury on the end of it?

A. That is the way I took it to be. I know it was right there, and I just took it to be that way.

[fol. 168] Q. That was the one that was struck on the end by the wheel?

A. Yes, sir, I took it to be that.

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W. F. Johnson, a witness for the defendants, was called, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. Where were you born and raised?

A. Tennessee County, Michigan.

Q. Were you on this passenger train on the night of the wreck?

A. I was.

Q. You were a passenger on the train?

A. Yes, sir.

Q. Where were you going from and to?

A. From Augusta to Florence.

Q. What time would you say you left Augusta?

A. I don't recall the exact time, but it was in the morning around three o'clock.

Q. Do you remember the time of the wreck and all?

A. Yes, sir.

Q. Did you get up and go out to see about it?

A. Yes, sir.

Q. Describe just what you saw?

A. Leaving Augusta I was awakened by the starting of the train from the station, and I remained awake until the accident occurred. The train moved slowly until it passed the Savannah River Bridge, and then it increased its speed, and shortly thereafter the train was derailed, and I should judge it was about 3:20 a. m., and as soon [fol. 169] as I could get dressed I went out on the ground, and to where the engine was turned over to the right, and then I came back and met Conductor Timmerman, and I introduced myself to him, and told him who I was, and we went back together and examined the track at the point of derailment, and the examination showed that one rail was out of place, and that the angle bars had been removed from each end of the rail, and the rail was laying parallel with the following rail about half its length, and on further examination of the angle bars, the bolts and nuts indicated that they had been removed by some one on purpose, and the condition of the bolts showed that they had not been stripped in any way, and further examination of the track near to the point of derailment showed no flange on the ties; and in company with Engineer of Maintenance, Mr. Jeffords, we took the level of the track, and also guaged, and also found that the track was in nearly perfect condition so far as the level and guage was concerned, and afterwards when the wreckage was cleared an examination of that showed that the rail was bent, and a new rail took its place in the track. Now, this is going towards Robbins (indicating to counsel and the jury), and this rail from all

appearances had been disconnected and the angle bars removed at each end, and after the accident the rail laid in this position on the ties, and was parallel with the following rail.

Q. Where were the nuts or bolts lying?

A. In close vicinity to where they were removed from.

Q. What did the perfect alignment of the undamaged portion of the track indicate?

A. Fifty-six and one-half (56 1-2) inches, and that is [fol. 170] perfect alignment or guage.

Q. I want to direct your mind as to whether or not there was an ordinary spreading of the rail?

A. There was no indication that the condition of the track caused the rail to spread.

Q. It was not a rail spreading wreck?

A. Not in my opinion. Inspection of the locomotive and cars showed no defect that would contribute in any way to cause derailment.

Mr. Busbee: Unless he qualifies as an expert, we move to strike that testimony out.

Mr. Gyles (continuing):

Q. When did you first start in the railroad business, Mr. Johnson?

A. In 1894.

Q. What did you start?

A. As fireman.

Q. Then what?

A. Brakeman and conductor, and yard master, and in charge of construction work, and I served eight years on the State Railroad Commission of Ohio, and seventeen years with the Interstate Commerce Commission, and my position now is Inspector and Special Investigator for the Interstate Commerce Commission.

Q. Did you examine that track along there?

A. Yes, sir.

Q. Are you familiar with the traffic over that section?

A. Somewhat at that time, but I am not in this territory now.

Q. That was eighty pound rails?

A. Yes, sir.

[fol. 171] Q. Was that proper for the volume of traffic?

A. Yes, sir.

Q. Did you notice the condition of the ties and the road bed?

A. It was practically new timber in that road bed.

Q. The condition of the railroad that had not been disturbed by this wreck—was its condition good or not?

A. Good condition.

Q. Was or not the ties and the rails and the angle bars, and all of these things of the regular and proper strength for that railroad?

A. Yes, sir, they were.

Q. Now about the inspections in this territory—it has been testified that they inspect the railroad two or three times a week, and that engineers look out, and there is inspection on motor cars—state whether or not the method of inspection you have heard testified about is sufficient for this territory and with the traffic handled?

A. I believe it compares favorably with the inspection of railroads in general.

Q. Where do they have track walkers—something was said about track walkers?

A. Where traffic is so heavy or in mountainous countries where there is possible slides.

Q. Would that apply to trestles and fires?

A. Yes, sir.

Q. Would that condition apply to this section?

A. No, sir, not at this particular point.

Q. Now, from the nature of the holes where the spikes came from—were they mashed or clean or what?

A. As I stated before, my examination of the track im-
[fol. 172] mediately afterwards—that is, after the accident, which included that also, showed that the spikes had been pulled directly upward. Had they been crushed out upon the flooring of the rail, it would naturally have made a slanting pull or splintered the tie, but they were pulled out straight.

Q. As an investigator—did you make an investigation of the wreck?

A. Yes, sir.

Q. Did you make a report to the Interstate Commerce Commission about it?

A. I did.

Cross-examination.

By Mr. Williams:

Q. Did you notice on the rail here to the left of the center that it looked like a wheel had hit it?

A. No, sir.

Q. You didn't notice that?

A. No, I did not.

Q. Did you notice on a tie where it looked like a bolt had been pulled up and set in a little further?

A. No, sir, there was nothing about this track. This rail was forward and was lying like that (indicating to the counsel and the jury).

Q. Did you see a little place there that was dented?

A. No, sir.

Q. Did you see on the tie here, and within three feet of it here, where a spike had been taken up and driven closer in?

A. No, sir, I did not see that. The wheel marks were on here, and started at the first tie from opposite this joint, but not directly opposite. There was an abrasion on this end of the rail.

[fol. 173] Q. Did you notice on this rail here (indicating to the witness)—I am talking about where you left the track that was perfectly good—did you notice any dent on the end of that rail?

A. No, sir.

Q. Was that rail inside or outside?

A. Outside of its original alignment.

Q. How far?

A. Six or eight inches.

Q. It had been struck?

A. I don't know.

Q. Well, did you see dents on it?

A. No, sir.

Q. Was the rail bent—the one that was taken out?

A. Yes, sir, the loose rail was bent.

Q. Which end—the end towards Augusta or which end?

A. It was bent generally by the derailment. If I remember right it was the east end, but it was bent so that it could not be put back in the track.

Q. If the conductor said that it was put back in the track he is mistaken?

A. Quite so.

Q. The rail was bent up so that you could not put it back in the track?

A. The loose rail was replaced by another rail.

Q. It was bent so that they didn't put it back in the track?

A. It was not put back. As to the rail being knocked out of place I could not say how the rail came out of place, but a train moving in either direction with the conditions of that nature, would naturally throw the rail out of place because it has nothing to support it. The frame of the engine is rigid, and there is a little sway rock to the engine, and it is possible that the engine truck struck that [fol. 174] rail and knocked it out of place, or it may be that the derailed cars carried that rail forward, but I could not say that positively.

Redirect examination.

By Mr. McKay:

Q. You were assigned by the Interstate Commerce Commission to make a report on the wreck?

A. Yes, sir, I investigated it and made my report to the Commission.

Q. What becomes of those reports?

A. They are published by the Interstate Commerce Commission.

Q. That—well what was your report as to the cause of that wreck?

Mr. Arrowsmith: Now, we object to that.

The Court: I will have to sustain the objection, Mr. McKay.

Mr. McKay (continuing):

Q. After your inspection that night of the situation that existed, and your inspection evidencing as you have said the removal of the bolts and the angle bars and spikes, as testified to,—what is your opinion as to the cause of the wreck?

Mr. Williams: We object to that.

The Court: I sustain that objection unless you have some authority.

Mr. McKay: He has stated the physical evidences, and I think he can say now what caused the wreck. I know

he could not say who caused the wreck, but he could determine whether or not the wreck was caused by bolts and spikes being taken out——

[fol. 175] Mr. Williams: We don't object to his saying that the bars and bolts had been taken out and that caused the wreck.

Mr. McKay (continuing):

Q. What in your opinion caused the wreck?

A. The condition of the track at the time that the train passed.

Q. Having seen the condition of the track just after the derailment, would it have been possible for the same conditions that existed immediately before the train reached there and was derailed, to have existed for several hours, and other trains to have passed over it?

A. No, sir.

Q. In other words, the testimony is that between twelve at night and the time of the wreck, three trains had passed over the same track?

A. Yes, sir, in my investigation I think it was one hour and forty minutes that the last train had passed over the track, and going in the opposite direction, and this condition would have caused that train to have been derailed if it had existed at the time. If the angle bars had been removed from each end of the rail and the spikes pulled, it would derail it.

Q. You are not employed by any railroad company?

A. No, sir.

Q. What is your present occupation?

A. Inspector and investigator for the Interstate Commerce Commission.

Recross-examination.

By Mr. Williams:

Q. You worked with the railroads how long before you started your present work?

[fol. 176] A. About twelve years.

Q. You worked as conductor and fireman?

A. Yes, sir.

Q. You have gone in the court house with suits like this?

A. Yes, sir.

Q. Fighting with them?

A. On the other side, yes, sir.

Q. Now, I want to ask you if you have not seen many wrecks where numbers of cars get over a place before one hung on a joint somewhere and threw it off?

A. There would have to be some condition there that caused it.

Q. Have you not seen many wrecks where the engine and car get over it?

A. Yes, sir, and it is possible that the train and car or engine and car went over this place because it traveled one hundred and ninety (190) feet. The engine frame is rigid and that holds it up.

Q. As long as it stays in place it will set there, but if in the shaping of the road that rail works out a little into the middle of the road where a flange of the wheel hits it to the left of the center, that will cause a derailment?

A. Yes, sir, a track out of alignment will cause a derailment.

Q. It would be possible for a whole train to pass over it before it got out for a train to hit it?

A. Yes, sir.

Q. How many passengers on the train that night?

A. I didn't count them.

*A.* A good many?

A. Not so many in the Pullman car I was in.

[fol. 177] Q. Several passengers went and looked at it?

A. Yes, sir.

Redirect examination.

By Mr. McKay:

Q. If the rail was in such perfect condition as my friend has pictured, will you state whether or not it would have been possible for it to have been driven forward?

A. Yes, sir, the force of the impact would carry it forward.

Recross-examination.

By Mr. Williams:

Q. If the engine had passed over it, and the whole of a car had hit it a little to the left of the center, that would carry it forward?

A. Yes, sir, certainly.

Q. Do you know whether the pony trucks stayed on the rail or not after the wreck?

A. That would be supposition. It is intact with the engine on the pilot. They were up in the air when I saw them.

(NOTE.—The Court here recessed at 1 p. m. until 2:30 p. m. for lunch.)

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D. F. JOHNSON, a witness for the defendants, was recalled to the stand at 2:30 p. m. and testified as follows:

Examination.

By Mr. McKay:

Q. I understand you to testify on cross-examination by Mr. Williams that it might have been possible for the [fol. 178] engine and tender, and possibly one car, to cross a rail exactly in alignment, but loosened, as was evidenced by your examination at the wreck—state whether or not in your opinion it would have been possible for a whole train to have crossed?

A. No, sir.

Q. I assume, that being true, that your answer would be the same as to four or five trains?

A. Oh, yes, sir.

Q. There was one other matter I wanted to ask you about—in reference to the rail just to the east of the rail that you testified was removed—state what, if any, marks you noticed on the right hand eastern rail?

A. There was a slight abrasion.

Q. Apparently what caused that?

A. I could not say. It might have been a wheel or something about the wrecked part of the cars.

Q. Did you see the rail which caused the wreck after the wreckage was taken off of it?

A. Yes, sir.

Q. Was that rail badly bent?

A. Yes, sir, so much so that it was not replaced in the track.

THOS. T. CUSHMAN was called as a witness for the defendants, sworn, and testified as follows:

Direct examination.

By Mr. Gyles:

Q. What is your position?
A. Clerk of Court.
Q. For Aiken County?
[fol. 179] A. Yes, sir.
Q. You have a record of the cases tried in criminal or civil courts?
A. Yes, sir.
Q. Was or not a case tried in May, 1922, of the State against Rivers, for car wrecking?

Mr. Arrowsmith: We object to the question and to any answer that may be interposed, upon the ground that the question itself would be irrevelvant, and the answer thereto would therefore not be relevant. If the answer should be yes, for the purpose of introducing that judgment, we cite you to the case of Parnell vs. A. C. L. Railroad Company, which specifically holds that such a judgment could not be introduced in evidence in this case, for the reasons which are clearly and fully set forth by the Supreme Court. The case is in 93rd S. C., I think.

The Court: I think that case settles it, and also on general principles. This is an independent matter, you see.

Mr. Williams: Yes, sir, we would have to go into all of the petitions before the Governor, and everything of the kind.

The Court: I don't think you can go into that. I rule that any criminal case has no relevancy here, and I rule that out on authority of that case. Of course, you ask the question.

Mr. Gyles (continuing):

Q. Reference has been made to the criminal case we are talking about—when was that case tried?

Mr. Arrowsmith: I object to that.

The Court: I rule that out. You get your questions in the record, Mr. Gyles. I don't mean to cut you off, and you can ask your question, but I rule that out.

[fol. 180] Mr. Gyles (continuing):

Q. Have you a record in your hands of this Court, showing the conviction of one Rivers for the wrecking of this train?

The Court: I understand objection is being made to it, and I rule that out.

Question by Mr. Williams:

Q. Have you also the record that the Governor for divers reasons pardoned this man?

The Court: I rule that out, too. You, gentlemen of the jury, understand you are trying this case on the facts produced here, and what somebody else did or failed to do, has nothing to do with it, and you try it on the evidence produced in this case.

Mr. McKay: That is our case.

Mr. Williams: We have nothing in reply.

Mr. McKay: There is one thing that I would like to call my friend's attention to, but I don't want to be forced into any technical position, but they have not shown that the lady has been duly appointed administratrix. If they have those papers, or even a copy, I would like to know?

Mr. Arrowsmith: Mrs. Temple has testified, or would have testified, as the statement shows, and also there is an order here to the effect that she was appointed as administratrix. When I get back home I will send such copies for the purpose of record to this Court.

Mr. McKay: I wish you would. I don't want to be in the position of being technical, but I call it to the Court's attention.

Mr. Busbee: We overlooked stating that we would offer the mortuary table in evidence, which we will do at this time. It is Section 751, Volume I, of the Code.

[fol. 181] Mr. McKay: It is all right, sir.

Mr. McKay: I anticipate that for a short time we will have a discussion of law, and we will have a motion to make, if the Court would like to dismiss the jury for a few minutes.

The Court: Is there any objection to the jury retiring?

Mr. Arrowsmith: No, sir.

The Court: Gentlemen of the jury, you may retire to your room for a few minutes.

(Note.—The jury retired to the room.)

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### Motion for Direction of Verdict

Mr. McKay: May it please the Court, in behalf of the defendant, we move for the direction of a verdict, on the following grounds:

1. That there is not sufficient evidence of actionable negligence to warrant the submission of this case to the jury.

2. The only reasonable inference to be drawn from the entire testimony is that the deceased came to his death by reason of the act of some intervening third party or agency.

3. We move generally for the direction of a verdict on the ground that there is not a sufficiency of proof to warrant the submission of the issue made by the pleadings to the jury, and that such submission of issues to a jury, if a findings should result against the defendant, and judgment be entered thereon, would constitute a violation of the defendants' rights under the due process clauses of the State and Federal Constitutions. In other words, in view of the nature and quantum of the evidence, our con-[fol. 182] stitutional rights, as guaranteed by the Federal Constitution, would be violated by a verdict and judgment in this case.

(Note.—The motion was thereupon argued to the Court by counsel, after which announcement was made as follows):

The Court: I am going to submit the matter to the jury.

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### Judge's Charge

Mr. Foreman and Gentlemen of the Jury: The time has arrived when I shall try to give you the law in this matter as best I can.

You have heard the complaint read, gentlemen, and outside of the formal parts of it, it is alleged that:

"That on the 20th day of May, 1921, plaintiff's intestate, Joseph R. Temple, was in the employ of the defendant Atlantic Coast Line Railroad Company as a locomotive engineer, and was the engineer on train No. 38, from Augusta, Georgia, bound for Sumter, South Carolina, which was a passenger train for hire operated by the defendant Atlantic Coast Line Railroad Company; that when said train had proceeded on its journey for a distance of about four and one-half miles out of Augusta towards Sumter, near Beech Island in Aiken County, South Carolina, said engine overturned along with two cars attached thereto, and in the overturning of said engine and cars plaintiff's intestate received wounds in and upon his head and body from which he died then and there.

"That late in the afternoon of May 19th, 1921, the agents, servants, an employees of the Charleston & Western Caro- [fol. 183] lina Railway had been working on the roadbed over which said engine was driven at the point where same was overturned and had negligently, carelessly, wilfully and wantonly failed to properly spike and bolt one of the iron rails on which said engine and train of cars had to run and keep the same properly spiked and bolted, and that when said engine and cars came upon said rail the same did not hold in the position it should have held to support the engine and cars, but one of the rails spread, thus causing the engine on which plaintiff's intestate was riding to turn over and the resultant death of plaintiff's intestate."

Now, you will have the complaint in there, and I suggest that you read it over carefully, and you can gather the other portions of it and also that, from the careful reading.

The answer of the railroad company admits the allegations contained in paragraphs one, two and three of the complaint. The first, second and third paragraphs of the complaint are admitted, you will observe. As I understand, that is down to the bottom of page two. In other words, the formal allegations of the complaint are admitted. If you will just come here, Mr. Foreman, I will explain this to you. (The Foreman approached the Court.) Those are formal allegations, and they admit everything down to there (indicating to the foreman of the jury). They admit paragraphs one, two and three and down to the fourth paragraph. Then answer denies the allegations

contained in paragraph four, except that it is admitted that one of the rails in the track at the point where the accident occurred did not hold, which this defendant alleges was caused and occasioned by the malicious act, or acts, of a person or persons not in the employ of either of the defendants, without their knowledge, and without opportu-
[fol. 184] nity of discovery on their part, as hereinfater more particularly described.

"With reference to paragraph five thereof this defendant alleges that the matters therein mentioned are matters of law for the determination of the Court.

"Admits the allegations of paragraph six thereof.

"Has not knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph seven thereof, and, therefore, denies the same, except as to the earning capacity of the said Joseph R. Temple at the time of his death, which allegation is admitted.

"Denies the allegations contained in paragraph eight thereof.

"Further answering the Complaint and by way of affirmative defense, this defendant alleges:

"That the accident and derailment in which the said Joseph R. Temple met his death at or near Beech Island, South Carolina, on or about the 20th day of May, 1921, was due and occasioned solely by reason of the malicious act, or acts, of some person or persons not in the employ of the defendants, in that such person or persons, without the knowledge or consent of the defendants, in the night time removed the bolts, spikes and fastenings from a rail in the track of the defendant, Charleston & Western Carolina Railway Company, at the point where the accident occurred, and when the train reached and went up said rail, thus loosened and made insecure, the engine was derailed, turned over down the embankment at said place, and the said Joseph R. Temple was killed; that the defendants had no oppro-unity of observing the rail after the bolts had been removed and the spikes withdrawn; that due diligence and care was exercised in the maintenance
[fol. 185] of the said track, which was safe and secure except for such malicious tampering with the same, and that

investigation instituted by the defendants led to the arrest of one George Rivers and his conviction for the wrecking of the train on the date in question, in the manner mentioned, etc."

That is the answer of the defendant.

Now, gentlemen, if I misstate the issues, you gentlemen correct me, because I want to try to make the jury understand this matter.

As I understand it, there is no dispute practically about the rail being loose. In other words, both sides admit that somebody or other loosed the rail, but the plaintiff contends that the defendant, and its agents and servants caused it, and the defendant claims that it was done by an independent agency—of some other parties that they had no connection with, and that they didn't have an opportunity to inspect it. That is the issue. The plaintiff claims that it was loosed by the defendant, or its agents and servants, and defendant claims that it was loosed by an independent agency, over which they had no control, and that they didn't have a proper opportunity to inspect it.

The plaintiff's case is based on negligence. Wilfulness and wantonness are out of this case entirely. The greater part of my charge will be from reading out of the text book, because this man has made a study of this matter, and he knows the law better than I do, and expresses it better than I could, and I will get the greater part of my charge out of these books.

Here is the statute that I understand this action is brought under:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, [fol. 186] or between any of the States and Territories, or between the District of Columbia, and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such

injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees, of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.''

Now, before I begin the general charge, when we speak of Interstate Commerce, we mean commerce from one State to another, such as between Georgia and South Carolina, and South Carolina and North Carolina.

Now, I am reading from Section 526 of Roberts, on page 912, of Volume I:

''The first section of the Federal Employers' Liability Act provides that every common carrier by rail while engaging in interstate commerce and while the servant injured or killed is employed in such commerce is liable 'for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other epuipment.' ''

[fol. 187] Right here gentlemen, I am going to try and give you an idea about negligence. Negligence is the want of due care. Or, it is the failure to do that which a man of ordinary care and prudence would do or the doing that which a man of ordinary care and prudence would not do. In other words, the ordinary man is set up as the standard —not a Solomon or a lunatic—not an exceptionally wise man or a fool, but it is the man of or-inary prudence, and what such man would do or would not do is set up as the standard in the case. The difference between negligence and wantonness and wilfulness is this: If I walk around and carelessly step on a man's foot that would be negligence, because I didn't intend to do it. That would be a lack of care, and the law would only impose actual damages; but if I slap a man's face, or spit in his face wantonly, that shows a wilful and malicious spirit. The law says that in a case of wilfulness that punitive damages or exemplary damages may be allowed. If I step on your foot, and didn't intend to do it, and acted as a gentleman,

and — I didn't intend to do it and begged your pardon, you would pass it up; but if I spit in your face you would knock me down because it is an invasion of your rights. This case, however, is based absolutely on negligence.

I am going to let this foreman carry the statute in the room with him, gentlemen, if there is no objection, so they can read the matter and see for themselves, and I am so constituted that if I read a thing myself I can get more out of it than hearing somebody else read it.

Now, I will read Section 528, beginning on page 914, of Roberts:

"Except that it abolishes the common law rule of non-liability for injuries to employees due to the negligence of fellow-servants, the first section of the Federal Em-[fol. 188] ployers' Liability Act, which defines when a carrier is liable, adopts the common law rule of negligence as to the two branches of liability mentioned therein. Negligence is the basis of all liability under the act, and there can be no recovery under the statute in the absence of negligence on the part of the railroad company or some of is employees. Under the act, the Company is not a guarantor of the safety of the place of work or of the machinery and appliances furnished its employees. The extent of its duty to its employees is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed and the tools and appliances furnished may be safe for the workman. To convict a defendant railroad company of negligence under the section, as to defects, plaintiff must prove the existence of the defect complained of; that it was a defect of such a character as to cause its existence to be a negligent failure on the part of the defendant; and that it was the proximate cause of the injury."

Mr. Stenographer, you will find a slight pencil mark here where I stopped reading in that section of page 919.

I am reading now from Section 537 on page 936 of the same book:

"A carrier is not liable for every act of negligence causing injury to one employee by another. The negligent act causing the injury must have been committed while the employee at fault was in the prosecution of the carrier's business;

for, when an employee voluntarily and without necessity growing out of his work abandons the employment and steps entirely aside from the line of his duty, he suspends the relation of employer and employee. When the negligent act which causes an injury to or the death of an employee had no relation whatever to the employm-nt, the carrier is not liable, for the employee at fault must have been, when [fol. 189] committing the act, within the scope of his employment."

I have read down to a pencil mark, Mr. Stenographer, on page 936.

Mr. Foreman, that simply means that you and I are liable for the acts of our duly constituted agents, acting in the scope of his employment and agency when he is about his business. That is a question for the jury as to when a man is acting in the scope of his employment.

Mr. McKay: We make no claim that the deceased was not engaged in the line of his duty at the time of his death. We make that statement in that connection.

The Court: All right. I am reading from Section 538, on page 942:

"For the plaintiff to recover under the Federal Employers' Liability Act it is not sufficient that he prove negligence and injury under conditions within the terms of the act. To create a jury issue, the plaintiff must introduce proof tending to show that the alleged negligence was the proximate cause of the damage. The character or evidence necessary to prove such causation must depend largely upon the circumstances of each case. The inquiry whether proof having such tendency has been introduced, is not to be solved by indulging in mere surmises or conjecture or by resorting to imaginary possibilities, for to do so would but resolve the question to the general rule of liability as an insurer."

I have read down to a pencil mark on page 944.

In other words, gentlemen, there are two things necessary in order to hold a party on negligence. There must be negligence, and negligence must be the proximate cause of the injury. If I were to go out and fire off a gun towards your house it would be a question for the jury to say whether I was negligent, but if I get off in a mile and [fol. 190] fire a gun, that would be a different proposition.

It depends on the circumstances, and the time and place, and it must be the proximate cause of the injury. If I put up a book, and strike it with my hand, the book is falling as a result of my striking it, and that is what I mean by proximate cause.

I will read Section 539, on page 545, of Roberts:

"Liability is shown under the federal act when the plaintiff proves that the injury or death was due either 'in whole or in part' to negligence of the defendant. This phrase is an adoption of the common law doctrine of concurrent causes. Although causes for which the carrier is not liable contribute directly to produce the injury, yet if a cause for which the carrier is liable, that is, a negligent act of any other employee or a defect or insufficiency due to negligence in equipment or works, contributes also as a cause, without which the injury would not have occurred, the carrier is still liable. The quoted phrase means nothing more or less than that the negligent act must be the proximate cause under the Federal Act of the injury, and in cases of doubt, to ascertain when a negligent act is the proximate cause under the federal law, decisions of Courts passing upon such questions under the common law, are applicable."

That, I think, explains that.

I am reading from Section 552 on page 976, Volume I:

"By its terms the national act is limited to negligent acts of a common carrier. Under well known principles of law, injuries caused by the wilful or intentional acts of another are not within the terms of the statute, for, as quaintly said by one jurist 'when wilfulness comes in at the door negligence goes out through the window.' Most statutes, giving rights of action for death define the wrongful act as the 'wrongful act, neglect or default of another' [fol. 191] which would include intentional wrongs; but the Federal Act, for some reason, has confined the wrongful acts for which a recovery can be had, to those which are due to negligence solely. A wilful assault of one employee upon another would be beyond the terms of the statute."

Now, I am reading from Section 600, on page 1063, of Volume II:

"No Recovery Under Federal Act Unless Relatives Named in Statute Suffer Pecuniary Loss—If at the time

of the death of an employee or an injury which subsequently caused death, the carrier was engaged in interstate commerce and the injured servant was employed by it in such commerce, there is no remedy against the carrier unless dependent beneficiaries named in the act survive him. The question of survival of the cause of action is not one of procedure governed by the state practice, but depends upon the substance of the action. Even though a deceased employee left surviving him beneficiaries named in the statute, yet there is no liability when the Federal Act is applicable, unless beneficiaries were dependent upon the deceased or suffered pecuniary loss by his death."

I have read down to the mark at the bottom of the page in Section 600, Mr. Stenographer. Now, I am reading down to the pencil mark in Section 608, on page 1074. Section 608 begins on page 1073, however.

"In an action under the Federal Act for the death of an interstate employee, the damages under section one thereof can only be compensatory, and the measure of them is what the beneficiaries named in the statute, and no one else, or either of them, necessarily lose in or by the death of the deceased employee. The damages are lim- [fol. 192] ited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. In measuring these damages, the jury are at liberty to take into consideration the age, health, expectancy of the life of the deceased, his earning capacity, his character, his mode of treatment towards his family and the amount he contributed out of his wages to them for their support, and calculate from all these facts the present value of the amount which the jury, as reasonable and practical men may find and believe the beneficiaries have lost because of the death."

I stopped, Mr. Stenographer, at a pencil mark on the bottom of page 1074.

Now, I am reading from Section 617, on page 1088, of the same volume:

"The pecuniary loss or damage which alone can be recovered under the Federal Act by the beneficiaries excludes those losses which result from the deprivation of

the society and companionship of the deceased, or those injuries to the affections and sentiments which arise from the death of relatives, and which, though painful and grievous to be borne, cannot be measured or recompensed by money. In the Vreeland case cited, it was held that the care and advice which the wife would have received from the husband if he had lived, was not an element of damage and threw the door open to the wildest speculation. In another case it was held that a loss to parents of the companionship of their son was not an element of damages under the Federal Act. The Supreme Court of North Carolina held that the damages recoverable by a parent for the negligent death of a son was limited under the Federal Act to such loss as resulted to the parents because of being deprived of a reasonable expectation of pecuniary bene- [fol. 193] fits by the wrongful death of the employee."

Now, I am reading from Section 618 on page 1089:

"Loss of Care, Counsel, Training and Education of Minors Proper Elements of Damage.—The care and advice which a wife would have received from her husband are not pecuniary losses within the meaning of the Federal Act. When, however, the beneficiaries under the statute are minor children, the care, counsel, training and education which the child would probably have received from the parent and which can only be supplied by the service of another for compensation, are proper elements of damages under the statute. A trial court, in an action under the Federal Act, instructed the jury that in measuring a minor's pecuniary loss by reason of the death of her father, they might take into consideration 'that money value, if any, and that care, training, counsel and education, if any, which the said Ruth Davis might reasonably have received from him, and which can only be supplied by the service of another for compensation, and of which she has been deprived by the wrongful death of her father, Oscar Davis, if any, and basing your finding, if any, only upon the evidence in this case."

I have read down to a pencil mark on page 1090, Mr. Stenographer.

Now, gentlemen, have these sections or citations covered the law in regard to this matter, before I go on to

other matters. If there is anything I have omitted, I wish that you would call it to my attention.

Mr. McKay: The only suggestion I could make is on the issue of negligence, and the burden of proof that devolves upon the plaintiff to prove that by the greater weight of the evidence.

[fol. 194] Mr. Williams: Yes, sir, but not the greater number of witnesses.

The Court: The burden of proof, gentlemen, is what convinces the reasonable man. The burden of proof is on the plaintiff to prove by the greater weight of the evidence—that is by the truth of the matter—the allegations of the complaint, and if it fails to do that, then they fail.

Mr. Williams: It is not the greater number of witnesses.

The Court: Well, that is a question entirely for you. That is a matter of common sense. I want to tell the jury that the facts in the case are entirely for them, and if in the reading here you have gained the impression that I am charging on the facts, then disabuse your mind of that, for I am simply trying to enlighten you on the subject. Is there something you want me to read, Mr. McKay?

Mr. McKay: Yes, sir, in this case here. I call it to your attention.

The Court: I am reading the fine print in 181 Federal Reporter, on page 94:

"First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely, a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. Second: That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point [fol. 195] to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between

these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Mr. Gyles: On the next page is something that I have marked that will be helpful to the jury:

The Court: I will read that.

"Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action in this case of the alleged defect in the lift pin lever and the coupler is indispensable to the maintenance of a verdict sustaining it.

"The happening of an accident which injures an employee raises no presumption of wrong or negligence by the employer."

That simply means, gentlemen, that the burden of proof is on the plaintiff to prove his case. They have alleged certain facts, which have been denied, and the burden of proof is on the plaintiff to show that by the greater weight of the evidence.

Now, there are two kinds of evidence—circumstantial [fol. 196] and direct. Of course, you know what direct evidence is. If I swear I saw a man walking across the snow that would be direct evidence, because I saw Mr. Williams, say, but I went out and saw tracks of a person, I would say that something with shoes went across there, or if it was a barefoot track I could tell that some human being had gone across there by the contour of the feet, although I didn't see it. Now, where you depend on circumstances in a civil case in order to infer one fact from some other fact or facts, these facts must point towards the object. You have seen a wagon wheel where all of the spokes point to the hub, and that is the same way as to circumstantial evidence. That is an old illustration, but

I have not found one any better than that. The facts must be consistent with each other. If you rely on a series of facts they must point in the same direction, and be consistent with each other. We act on circumstances every day in the year, but they must be reasonable circumstances, and not fanciful and imaginary, but good sound reason and common sense.

The authority of the book that I read from says that my other two cases that I tried along this line were wrong, so I thought I would follow him this time by reading out of his own book. I think I have covered everything.

Through an oversight of the Clerk of Court at Florence, the original papers were not sent here, and it is agreed that you can write whatever verdict you reach on the back of the answer. The amount sued for is Thirty Thousand Dollars——

Mr. Williams: Yes, sir, and the defendant now is the Atlantic Coast Line Railroad Company.

The Court: Yes, sir, and it is Mrs. Hannah R. Temple that is the plaintiff. If you find for the plaintiff, say we [fol. 197] find for the plaintiff so many dollars, and that will mean of course against the Atlantic Coast Line. Just say we find for the plaintiff—if you do find for the plaintiff —so many dollars, not over Thirty Thousand Dollars ($30,000.00), and write it out in words and not in figures; or, if you find for the defendant, just say we find for the defendant. You can say we find for the plaintiff against the Atlantic Coast Line Railroad Company if you find for the plaintiff, and if you find for the defendant just say we find for the defendant. Here is the statute, gentlemen.

Mr. Williams: I understand they do not object to the jury having the statute.

Mr. McKay: No, sir, not when we keep quiet, and do not raise such objection.

The Court: Gentlemen, you may retire.

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### Verdict

After deliberation, the jury returned a verdict in favor of the respondent for Twenty Thousand ($20,00-.00) Dollars. Motion for new trial was duly noted and argued and after consideration of same, said motion was denied and the following order filed:

IN COURT OF COMMON PLEAS OF AIKEN COUNTY

ORDER REFUSING NEW TRIAL

I refuse a motion for a new trial in this case.

The grounds for the same are hereby overruled.

The only question that gave me any concern was whether or not a verdict ought to have been directed for plaintiff on the ground of insufficiency of evidence to carry case to jury.

The plaintiff relied on nine circumstances: 1. The fact [fol. 198] of section hands working in neighborhood of wreck; 2. The wreck itself; 3. Bolts unsecured; 4. Spikes pulled clear and drawn; 5. Bolts and nuts neatly piled at the ends of the ties; 6. Angle plates were properly removed; 7. Passage of four or five trains over the point before the wreck occurred; 8. The dent in the end of the rail; 9. The rigid part of the engine had passed over the point before rail spread. Under all the facts and circumstances it made a case for the jury.

The motion for a new trial ought to be refused and it is so ordered and adjudged. This case was marked "Heard," in open court and decision reserved.

C. J. Ramage, Special Judge, Presiding.

June 3, 1926.

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Notice of intention to appeal was thereafter duly given.

The respondent offered the following amendments to proposed case for appeal:

IN COURT OF COMMON PLEAS OF AIKEN COUNTY

PROPOSED AMENDMENTS

To Messrs. Herbert E. Giles and Douglas McKay, attorneys for appellant:

Take notice that respondent above named, by her attorneys, the subscribers hereto, propose the following amendments to the proposed case:

1. Order overruling motion for new trial.

(Omit caption and insert Order.)

This to be placed immediately following the conclusion of the Judge's charge.

2. Proceedings with respect to the trial, conviction, and [fol. 199] pardoning of George Rivers,

(a) Indictment.
(b) Sentence.
(c) Transcript of evidence.
(d) Petitions before the Governor.
(e) Governor's pardon.

Insert the foregoing just following the order refusing the motion for new trial and just in advance of the exceptions.

Respectfully submitted.

Williams, Croft & Busbee, Philip H. Arrowsmith.
Attorneys for Respondent.

Florence, S. C., September 12, 1929.

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The Circuit Court filed the following order settling the case:

IN COURT OF COMMON PLEAS OF AIKEN COUNTY

ORDER SETTLING CASE FOR APPEAL

After hearing arguments on motion to settle the case for appeal herein,

It is ordered that the proposed amendment 1, to insert the order overruling motion for new trial, be adopted, and that said order be placed immediately following the conclusion of the Judge's charge; proposed amendment 2 is disallowed.

It is further ordered that the notice of amendments proposed by the respondent be printed at its proper place in the record.

C. J. Ramage, Circuit Judge.

Saluda, South Carolina, ——, 1929.

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[fol. 200] IN COURT OF COMMON PLEAS OF AIKEN COUNTY

EXCEPTIONS

The trial Judge erred in refusing to permit the defendant to show that a negro had been convicted of the crime

of wrecking the train in question, since such evidence
pertinent to the defense and was an element properly
be considered, if there was an issue of negligence to be
termined by a jury.

2. The trial Judge erred in overruling appellant's
tion for non-suit and for direction of verdict, since th
was not sufficient evidence of defendant's negligence
warrant the submission of that issue to the jury.

3. The trial Judge erred in submitting the issues to
jury, since the only reasonable inference to be drawn fr
the entire evidence was that plaintiff's intestate met
death by reason of the malicious action of some th
party in loosening a rail and tampering with defenda
track so as to wreck the train.

4. The trial Judge charged the jury as follows:

"In another case it was held that a loss to parents
the companionship of their son was not an element
damages under the Federal Act. The Supreme Court
North Carolina held that the damages recoverable b
parent for the negligent death of a son was limited un
the Federal Act to such loss as resulted to the par
because of being deprived of a reasonable expectation
pecuniary benefits by the wrongful death of the employe

This constituted error in that there was no issue
this case of loss to parents, hence the unnecessary inject
of this element of recovery into a case where the mot
of the deceased was the nominal party plaintiff was m
leading and prejudicial to the appellant.

(Here follow Exhibits 4 and 5, side folios 200a and 200

MAP IS TOO LARGE TO BE FILMED.

[fol. 201] IN SUPREME COURT OF SOUTH CAROLINA

Case No. 891. Opinion No. 13214

HANNA R. TEMPLE, Admx., Respondent,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

Appeal from Aiken County

C. J. Rabage, Judge

Affirmed

Herbert E. Gyles, of Aiken, and Douglas McKay, of Columbia, for appellant.

Philip H. Arrowsmith, of Florence, and Willaims, Croft, & Busbee, of Aiken, for respondent.

OPINION—Filed July 31, 1931

CARTER, J.:

This case, commenced in the Court of Common Pleas for Florence County, but transferred to Aiken County, is an action under the Federal Employers' Liability Act for the alleged wrongful death of the plaintiff's intestate, Joseph R. Temple. The defendant, by way of answer, set up a general denial and wrongful and malicious act of a third party. The case was tried in the Court of Common Pleas for the said County of Aiken, before Honorable C. J. Ramage, special Judge (now regular Judge), and a jury, November 20, 1928, resulting in a verdict for the plaintiff for the sum of twenty thousand ($20,000.00) dollars actual damages. From the entry of judgment on the verdict the defendant has appealed to this Court.

A number of exceptions are presented but the only allegation of error relied on by appellant for reversal is:

"There is no evidence to show negligence by appellant in maintaining its track; as alleged, but, on the contrary, the undisputed circumstantial evidence shows that the wreck was caused by the criminal acts of third persons."

We shall, therefore, not consider any of the other questions raised by the exceptions.

At the time of his death, June 20, 1921, the plaintiff's intestate, Joseph R. Temple, was in the employ of the defendant, Atlantic Coast Line Railroad Company, as a locomotive engineer, running on passenger train No. 38 from Augusta, Georgia, bound for Sumter, South Carolina, engaged in interstate commerce. When the train had proceeded several miles from the city of Augusta and was near Beach Island, in Aiken County, South Carolina, the engine attached to said train overturned together with two of the attached cars, and, as a result, the plaintiff's intestate was wounded, which caused his death. The suit was brought for the benefit of the infant children of the deceased who reside with their grandmother, their mother, widow of the deceased, having died while the action was pending. It appears that two of these children are feeble-minded. The [fol. 202] acts of negligence, charged and relied on by the plaintiff as a basis of recovery, are as follows:

4. "That late in the afternoon of May 19th, 1921, the agents, servants and employees of the Charleston and Western Carolina Railway had been working on the road bed over which said engine was driven at the point where the same was overturned and had negligently, carelessly, wilfully and wantonly failed to properly spike and bolt one of the iron rails on which said engine and train of cars had to run and keep the same properly spiked and bolted, and that when said engine and cars came upon said rail the same did not hold in the position it should have held to support the engine and cars, but one of the rails spread, thus causing the engine on which plaintiff's intestate was riding to turn over and the resultant death of plaintiff's intestate.

5. That although the defendant Atlantic Coast Line Railroad Company was not in the actual charge of the maintenance of the said track at the place of the accident, yet it was its duty to see that its employees were furnished a safe track on which to operate its trains, the negligence and carelessness of the servants, agents and employees of the Charleston & Western Carolina Railway in the construction and maintenance of its roadbeds and tracks used by the defendant Atlantic Coast Line Railroad Company being

the negligence and carelessness of the defendant Atlantic Coast Line Railroad Company."

Counsel for respondent state their position as follows:

"The allegation of the complainant being that the death of plaintiff's intestate was due to the negligence and carelessness on the part of the defendant to properly spike and bolt one of the iron rails on which said engine and train of cars had to run and its failure to keep the same properly spiked and bolted, the result being that when said engine and train of cars came upon said rail the same did not hold in position to support the engine and cars, if there was sufficient testimony to support that allegation, the verdict should — sustained."

As stated, the contention of appellant is:

"There is no evidence to show negligence by appellant in maintaining its tracks, as alleged, but, on the contrary, the undisputed circumstantial evidence shows that the wreck was caused by the criminal acts of third persons."

The federal Statute under which the action was instituted reads as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia, and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then [fol. 203] of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees, of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances,

machinery, track, roadbed, works, boats, wharves, or other equipment."

In accordance with the requirement of this Statute, as construed by the Courts, the plaintiff assumed the burden of establishing negligence on the part of the defendant as to the acts alleged to have caused the death of the plaintiff's intestate, that is, the failure to properly spike and bolt one of the iron rails on which said engine and train of cars had to run, and keep the same properly spiked and bolted. In its answer the defendant admitted that one of its rails in the track at the point where the accident occurred did not hold but the defendant contends, as alleged, that the failure of the said rail to hold was caused and occasioned by the malicious act or acts of a person or persons not in the employ of the defendant, without the knowledge and without opportunity of discovery on its part. As stated by the Trial Judge in his refusal to order a new trial, the plaintiff relied on nine circumstances to establish the act or acts of negligence alleged to-wit: 1. The fact of section hands working in neighborhood of wreck; 2. The wreck itself; 3. Bolts unsecured; 4. Spikes pulled clear and drawn; 5. Bolts and nuts neatly piled at the ends of the tires; 6. Angle plates were properly removed; 7. Passage of four or five trains over the point before the wreck occurred; 8. The dent in the end of the rail; 9. The rigid part of the engine had passed over the point before rail spread. Just what time the section hands were working at or near the place of the wreck may be said to be in dispute, but if the testimony of the witness, C. M. Randall, is to be believed, it may be reasonably inferred that they were working there, fixing a rail in the afternoon of May 19, 1921, not many hours before the wreck occurred, which was on the following morning about 3 A. M. The other facts stated, two to nine, inclusive, are not in dispute or are clearly established. It clearly appears from the testimony that when an inspection of the scene was made soon after the wreck it was discovered that the rail in question was badly bent and the spikes and bolts where the track was loose were seen lying on the crossties three or four cross ties had been taken loose and, it appeared, according to the witness, Dobson, that the "flanges or angle plates were on the Augusta end of the rail". There also appeared to be a dent about the center of the middle of the rail. With ref-

erence to the condition of this rail the witness, Dobson, testified:

"Q. A train going towards Augusta would not hit the rail that way?

A. No, sir, it would push it back in it looks like.

Q. But one coming from Augusta would hit it?

A. Yes sir."

If this be true, a train going over the rail in question in the direction of Augusta would not be wrecked, and this accounts for the fact that the trains that passed over the place going in the direction of Augusta during the same night passed over safely. According to our view of the testimony the conditions found to exist at the place of the accident lead to the conclusion that the rail in question was left unbolted and unspiked by the section hands and not caused and occasioned by some outside person as contended by the defendant. It is hard to conceive of a person bent on mischief taking time enough to arrange the bolts and spikes in the order in which they were found and to have done the other acts in the manner described by witnesses. On the other hand it may be reasonably inferred from all of the facts and circumstances that the section [fol. 204] hands left the work at that place unfinished the evening before the wreck occurred. According to our view this was an issue for the jury.

It may be that not any one of the circumstances to which we have referred would be sufficient to establish the allegation of negligence charged by the plaintiff against the defendant, but when all of these circumstances are considered together, in our opinion, a case for the jury was made.

The exceptions are, therefore, overruled and the judgment affirmed.

Blease, C. J., and Stabler, J., concur. Cothran, J., dissents.

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IN SUPREME COURT OF SOUTH CAROLINA

DISSENTING OPINION

COTHRAN, J. (dissenting):

This is an action for damages alleged to have resulted from the wrongful death of the plaintiff's intestate, Joseph

R. Temple, who at the time of his death was employed by the defendant company as the locomotive engineer of a passenger train being operated between Augusta, Ga., and Sumter, S. C., on May 20th, 1921. At a point about four miles south of Augusta and about 2500 yards north of a station on the Charleston and Western Carolina Railroad, called Beech Island, the train was derailed, the engine was over-turned and the engineer was killed. Under an arrangement between the Coast Line and the C. & W. C. Ry. Co., the train was being operated upon the track of the latter, between Augusta and Robbins, in Barnwell County; thence it ran upon its own track to Sumter and beyond. The negligence alleged in the complaint, as the cause of the derailment, is that the employees of the C. & W. C. Ry. Co., had failed to spike and bolt one of the rails and keep the same spiked and bolted, causing the rail to spread and the engine to turn over.

The case was tried before his honor Judge Ramage and a jury at Aiken in November 1928; the trial resulted in a verdict for the plaintiff of $20,000.00 actual damages. Motions for non-suit, direction of verdict and new trial were made by the defendant and overruled. From the judgment entered upon the verdict the defendant has appealed.

I propose to discuss only the motion of the defendant for a directed verdict in its favor upon the ground that there was not sufficient evidence of negligence on the part of the defendant, or of those for whom it was responsible, to require or justify a submission of that issue to the jury.

It is conceded on all sides, in fact it is so alleged in the complaint, that the case is one under the Federal Employers' Liability Act. In the case of Shiver v. R. Co., 155 S. C. 531, this Court quotes with approval from the case of R. Co. v. Davis, 279 U. S. 34, as follows:

"It is unquestioned that the case is controlled by the Federal Employers' Liability Act, under which it was prosecuted. Hence, if it appears from the record that under the applicable principles of law as interpreted by the Federal Courts, the evidence was not sufficient in kind or amount to warrant a finding that the negligence of the Railroad Company was the cause of the death, the judgment must be reversed."

[fol. 205] The effect of this ruling is to annul, in cases arising under the Federal Employers' Liability Act, the rule applied by this Court, known as the scintilla rule, and to impose upon the state courts, in such cases, the duty of examining the evidence and determining whether there was sufficient evidence of negligence to have justified the finding of the jury that such negligence was established; and if not the duty becomes imperative to direct a verdict in favor of the defendant.

In the latest case upon the subject, Gunning v. Cooley, 281 U. S. 90, the Court said:

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule that in every case before the evidence is left to jury there is a preliminary question for the Judge, not whether there is literally no evidence but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of the proof is imposed." Citing cases.

Again:

"Where the evidence on any issue is all on one side, or so overwhelmingly on one side as to leave no doubt as to what the fact is, the Court should give a preemptory instruction to the jury. (Citing cases.)

"When a plaintiff produces evidence that is consistent with a hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither. (Citing cases.)

"The burden was on plaintiff to establish the negligence and injury alleged and if the evidence failed adequately to support either element defendant's motion should have been granted."

The plaintiff offered only two witnesses, a man named Dobson, who conducted business in a store at the Beech Island station and a gravel bed not far from the wreck, and a farmer named Randall, who lived near the station.

Dobson visited the scene of the wreck the next morning about 6:30; he testified that the indications were that the rail had been tampered with by some evil disposed person; that the rail was torn up; that the spikes holding the rail

to the cross-ties, had been pulled out and were lying loose on the cross-ties; that the bolts holding the angle-bars in place at the joint of two rails, had been unscrewed and removed, and were likewise lying upon the cross-ties; that after the rail spikes had been drawn and the angle-bars removed, one end of the rail had been bent over toward the center of the track and spiked down to the cross-ties, making a derailment inevitable; that there was a dent about the middle of the rail indicating that the rail had been pushed in towards the center of the track; that later in the day he was at the wreck and remarked that "it looked like it had been wrecked, and there might be come tools"; that he followed tracks leading from the point of derailment to a gravel-pit some 50 feet away, and there found among the bushes a crowbar, used for pulling spikes and a wrench used for removing nuts from bolts; both tools were marked as the property of the Southern Railway Company whose line was some five or six miles away; that the spikes holding rails to the cross-ties had been removed, pulled out, not mashed out, from three cross-ties and at the points from which they were drawn were indications of abrasions from the "heel" of the crow-bar, evidently caused as the spikes were withdrawn.

[fol. 206] The other witness for the plaintiff, one Randall, testified, that on the afternoon before the wreck he had seen hands working on the railroad, apparently fixing a rail, at a point between Beech Island station and the gravel pit; that he was at the crossing at Beech Island station, looking toward Augusta; he could not say just where they were or what they were doing. The blueprint in evidence shows that it is exactly a mile from the crossing at the station, to a curve in the track toward Augusta, and half a mile from the curve to the point of the wreck. It is impossible therefore for the witness Randall to have seen the point of the wreck from the crossing at Beech Island, even if it could be considered that there was anything in his testimony indicating that the track was disrupted by the section force that he saw at work.

It seems impossible to conclude that there was the slightest evidence from this testimony tending to show that the derailment was caused by an act of the C. & W. C. Ry. Co.; much less does it show that there was sufficient evidence upon the issue to justify submission to the jury. On the

contrary considering the evidence alone produced by the plaintiff the conclusion is irresistible that the derailment was caused by an out-sider.

The testimony of witnesses for the defendant exonerates the C. & W. C. Ry. Co., beyond the shadow of a doubt:

The section foreman testified that he had not worked on the track at the place of the wreck for sixty days; on going to the wreck the day after, he found that dents where spikes were removed which held the rails to the cross-ties were freshly made by the "heel" of the crow-bar.

The roadmaster upon going to the wreck with other officials that morning found that a rail had been taken out and the spikes pulled out of the ties and not mashed; that the bolts had been taken from the angle-bars and the rail shoved out of position; that there were dents in the ties where the spikes had been pulled by the crow-bar; that the rail fastenings were lying on the ground or upon the cross-ties with the spikes scattered along.

Davies, a planter, who lived at Beech Island and saw the wreck that morning, testified that one end of the rail going from Augusta was set in, and the angle-bars had been removed; that the bolts and nuts were on the track near this end of the rail and the spikes had been drawn so as to set the rail in; that the hail had been unbolted and set in and was spiked down to the cross-ties; that a car wheel had hit the end of the other rail toward Augusta; that the rail had been pulled in out of line from one to three inches and spiked down; that the angle-bars connecting this and the other rail had been entirely removed.

The general roadmaster of the defendant company, who arrived at the wreck about 9:30 A. M., found that the rail had been removed, the bolts and angle-bars taken off and were lying on the ground; that the spikes had been pulled clean and clear from the cross-ties with a crow-bar, and the rail pushed out of its original position; that the outside spikes of the removed rail were lying between the ties.

The Engineer of Maintenance of Way of the C. & W. C. Ry. Co., who arrived at the wreck about 5:30 A. M., found conditions with respect to the rail being removed and the bolts and spikes drawn, as testified to by the other witnesses; that the bolts and nuts were in a pile at the end of the rail and the spikes were lying between the ties near the original position of the rail; that section foremen in pull-

ing spikes pull clear and do not bend them, and are in-
[fol. 207] structed to gather them up and take them to the section house.

The wrecking foreman, who arrived about 5:30 A. M., found one rail was ripped up with the spikes drawn, leaving a clean hole, not mashed out, and the rail shoved out of line; that when spikes are mashed out by a wreck the spikes will be crooked and the holes larger; that about eight spikes had been pulled from the inside of the rail; that you could see the "heel" print from the crowbar where they had been drawn; that a section-master will break the bolts with a hammer in removing angle-bars, and carry away the scrap; that the angle-bars were pulled and were lying near the joint.

The conductor of the wrecked train found a rail disconnected, the angle-bars off with the bolts out and the nuts first screwed off; that the spikes, nuts, bolts and angle-bars were lying on the ground.

The flagman found about the same condition as to bolts and angle-bars.

The vice president and general manager of the C. & W. C. Ry. Co. arrived between 6:00 and 8:00 o'clock A. M., and found that the rail had been removed with the angle-bars loose on either side of it, the spikes on one side of the rail removed and the rail pushed forward; that all the bolts and spikes were taken out of the rail.

A passenger on the wrecked train who was also an inspector and special investigator for the Interstate Commerce Commission with large experience, examined the track immediately after the wreck and testified that one rail was out of place and that the angle-bars had been removed; that the angle-bars, bolts, and nuts which were lying close by, indicated that they had been removed by some one intentionally; the condition of the bolts showed that they had not been stripped in any way and that the track was in nearly perfect condition as to line and gauge; that the spikes from the ties had been pulled directly upward; that there would have been a slanting pull or a splintered tie if they had been crushed out.

The evidence further showed that the track at the place of the wreck had been newly timbered, bolted up and serviced about two months or less before the wreck and was practically built over; new cross-ties put in and the track had had time to settle.

Seven engineers who operated trains over the place of the wreck, some of which passed the point the afternoon and evening before the wreck, and up to about 1:35 A. M., about an hour and a half before the wreck, testified that they noticed nothing unusual in passing over this point and no defect in the track; that the ties were new, the track in good condition and the rails and appliances were of proper strength.

The roadmaster had inspected the track as late as 5:30 P. M., on the day before the wreck.

The engineer of Maintenance of Way had been over the track on Tuesday prior to Friday, the day of the wreck.

Seven trains, both freight and passenger, passed over the place of the wreck in both directions between the afternoon and the time of the wreck.

The section foreman of the Southern Railway Company, whose section house was about four miles from the place of the wreck, testified that his section tool-house had been entered at sometime during the afternoon or night preceding the wreck and a crow-bar and a wrench taken therefrom; he identified the tools found near the wreck as those stolen from his tool-house.

[fol. 208] The evidence tending to sustain the allegation that the derailment was caused by the negligence of the section force of the C. & W. C. Ry. Co., is of the weakest possible character. Reliance is placed upon the testimony of the witness Randall who stated that he saw a section force working on the track as if they were adjusting a rail, at some time in the afternoon. He was unable to definitely locate them or to tell what they were doing. This is absolutely the only evidence tending in the remotest degree to connect the C. & W. C. Ry. Co., with the derailment.

Against any inference that the section force was connected with the derailment, is the conceded fact that Randall could not have seen the force working near the place of the wreck; he must have seen them within the mile between the road-crossing and the curve in the track. Against it also is the fact that seven trains passed over the track between evening and the wreck, one of which passed after one o'clock A. M., long after it must be assumed, the section forced "knock off", an impossibility if the force had left the track in the condition which caused the derailment. Against it also is the extreme improbability that the section

foreman, nor any of the force, would in broad day-light commit such an act.

It appears to me that the case is controlled by the doctrine delcared in Patton v. R. Co., 179 U. S. 658:

"The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second, that in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence, the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

See also:

R. Co. v. Driggers, 279 U. S. 787.
R. Co. v. Tyner, 278 U. S. 565.
R. Co. v. Powe, 75 L. Ed. 721.
R. Co. v. Gillespie (C. C. A.) 224 Fed. 316.
Savitz v. R. Co. (Pa.) 48 at 987.

For these reasons I think that the judgment of the Circuit Court should be reversed and the case remanded to that Court for the entry of judgment in favor of the defendant under Rule 27.

[fol. 209] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

PETITION FOR STAY

To the Honorable Thomas P. Cothran, Associate Justice of the Supreme Court of South Carolina:

The petition of the Atlantic Coast Line Railroad Company, respectfully shows:

1. That final judgment of the Supreme Court of South Carolina in the above entitled cause against your petitioner was rendered on July 31, 1931, by an opinion affirming the judgment of the trial Court.

2. That the said final judgment is subject to review by the Supreme Court of the United States on Writ of Certiorari, upon the grounds that the said final judgment denies to your petitioner rights, privileges and immunities granted to it under the constitution and laws of the United States.

3. Your petitioner further presents that the cause of action herein arises solely under the Act of Congress and Acts amendatory thereto commonly known as the Federal Employers' Liability Act, under which all questions of liability are finally determinable only by the Supreme Court of the United States, which has ultimate jurisdiction of questions of law and fact arising in such case.

4. That your petitioner, being the party aggrieved by the aforesaid judgment, desires to apply for a Writ of Certiorari from the Supreme Court of the United States, and in order to make such application and obtain such Writ it is necessary that the execution and enforcement of such judgment be stayed for a reasonable time.

[fol. 210] 5. That your petitioner stands ready to give such security for the protection of the plaintiff in the above entitled cause as may be necessary or proper.

Wherefore your petitioner prays that the execution and enforcement of said judgment, rendered as aforesaid on July 31, 1931, be stayed pursuant to the Acts of Congress in such case made and provided, and that your petitioner

be alloted a period of ninety days from date of said judgment in which to apply for a Writ of Certiorari from the Supreme Court of the United States.

(S.) Thomas W. Davis, (S.) Douglas McKay, Attorneys for Atlantic Coast Line Railroad Company.

Dated August 3rd, 1931.

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[fol. 211] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

ORDER STAYING EXECUTION

The defendant-appellant, herein, Atlantic Coast Line Railroad Company, having heretofore made application for stay of execution and enforcement of judgment in the above entitled cause for a reasonable time in order to enable it to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States, it is

Ordered that the said defendant have ninety days from the date of said judgment within which to apply for a Writ of Certiorari from the Supreme Court of the United States and that the remittitur and execution and enforcement of said judgment herein be stayed until final disposition of said petition for certiorari and until further order of this Court, provided that said defendant shall file a bond with good and sufficient surety in the penal sum of one thousand ($1,000) dollars within ten days from the date hereof, conditioned to indemnify the plaintiff above named against all damages and costs that she may sustain by reason of the stay if the defendant fail to make application for such Writ within the period allotted therefor, or fail to obtain an order granting its said application, or fail to make good its plea in the Supreme Court of the United States.

It is further ordered that a copy of this order be served without delay on the plaintiff herein, or on one of her [fol. 212] attorneys of record.

It is further ordered that this order be filed in the office of the Clerk of the Supreme Court of South Carolina.

Dated this 6th day of August, 1931.

T. P. Cothran, Associate Justice of the Supreme Court of South Carolina.

[fols. 213 & 214] Bond on stay for $1,000, approved August 6, 1931, omitted in printing.

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[fol. 215] In Supreme Court of South Carolina

[Title omitted]

Præcipe for Transcript of Record

To the Clerk of the above-entitled court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of:

The record on appeal in said cause;

The opinion of the Supreme Court of the State of South Carolina;

All journal entries contained in the records and proceedings of the Supreme Court of the State of South Carolina relating to said cause;

The final judgment and decision of the Supreme Court of the State of South Carolina;

Your certificate to the record that it is a complete record in said cause.

Dated this 8th day of September, 1931.

Thos. W. Davis, Wilmington, N. C.; Douglas McKay, Columbia, S. C., Attorneys for Atlantic Coast Line Railroad Company.

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[fol. 216] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 217] Supreme Court of the United States

Order Allowing Certiorari—Filed November 30, 1931

The petition herein for a writ of certiorari to the Supreme Court of the State of South Carolina is granted. And it is further ordered that the duly certified copy of

the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Endorsed on cover: File No. 36,267. South Carolina Supreme Court. Term No. 453. Atlantic Coast Line Railroad Company, petitioner, vs. Hannah R. Temple, administratrix of the estate of Joseph R. Temple, deceased. Petition for a writ of certiorari and exhibit thereto. Filed October 12, 1931. File No. 36,267.

FILE COPY

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CHARLES ELMORE CR
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

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# No. 453

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ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

*vs.*

HANNAH R. TEMPLE, ADMINISTRATRIX OF THE ESTATE OF JOSEPH R. TEMPLE, DECEASED, RESPONDENT.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

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THOMAS W. DAVIS,
*Wilmington, N. C.;*
DOUGLAS McKAY,
*Columbia, S. C.;*
V. E. PHELPS,
*Wilmington, N. C.,*
*Counsel for Petitioner.*

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

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# No. 453

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ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

*vs.*

HANNAH R. TEMPLE, ADMINISTRATRIX OF THE ESTATE OF JOSEPH R. TEMPLE, DECEASED, RESPONDENT.

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## PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable the Supreme Court of the United States:*

Your petitioner, Atlantic Coast Line Railroad Company, respectfully asks this Court to review on writ of *certiorari* a judgment of the Supreme Court of the State of South Carolina in the case of *Hannah R. Temple, Administratrix of the Estate of Joseph R. Temple, deceased,* versus *Atlantic Coast Line Railroad Company,* rendered on July 31, 1931, as shown by a

true copy of the record therein, herein filed (R., 201). Under the practice prevailing on appeal in South Carolina, no final judgment separate from the opinion of the Supreme Court is rendered, and the opinion is the final judgment. See Clerk's certificate (R., 217).

The matters involved and the reasons relied on by petitioner for the allowance of the writ are:

I.

This action was brought, tried and decided under the Federal Employers' Liability Act, as amended (R., 3, 7, 9, 201), to recover for the alleged negligent death of Joseph R. Temple, an engineer in the employment of the petitioner, who was killed in a wreck of petitioner's passenger train, which occurred at or about 3:10 a. m. on the morning of May 20th, 1921, while the train was being operated over the track of the Charleston & Western Carolina Railway Company, under a trackage agreement. The accident happened at a point in South Carolina about four and one-quarter miles east of Augusta, Georgia, and about one and one-quarter miles from the Savannah River (R., 6, 29) and about a mile and one-half, or one and three-tenths miles west of the station at Beech Island, S. C. (R., 13, 129), which is between Ellenton, S. C., and Augusta, Ga. The train was running from Augusta towards Ellenton, S. C., and Sumter, S. C. The track is practically level from the Savannah River to Beech Island station (R., 131). The only ground of negligence alleged in the complaint was (R., 6) that the section employees of the Charleston & Western Carolina Railway Company had negligently failed to spike

and bolt one of the rails on which the train had to run and keep the same properly spiked and bolted, thereby causing one of the rails to spread and the engine to turn over, killing intestate. *The sole question involved herein* (R., 200) *is whether there is any substantial evidence to sustain a finding that intestate's death was caused as alleged.*

As but two witnesses testified for respondent, only one of whom was at the wreck after the derailment, and as the testimony of this witness substantially agrees with the testimony of one or more of petitioner's witnesses, petitioner feels that it will conduce to clearness in considering the testimony to first state the material evidence offered by respondent and to then state the undisputed part of petitioner's testimony. Respondent's witness Dobson arrived at the wreck about 6:30 a. m. and found one rail torn up and bolts and spikes were lying loose on the cross-ties, and the engine, tender and two coaches were off the track (R., 13, 14); there was a dent about the center of the middle of the rail that was not in line, which might have been made by the train coming from Augusta, but it looked like it would not have been made by one coming from the other direction (R., 15); the bolts and angle bars had been "removed" by somebody from the rail which was loose and out of place (R., 17), and that end of the rail toward Ellenton was pulled in and *spiked* in from the outside, making the track too narrow and wrecking the train (R., 17, 18).

This witness first stated that the spikes removed from this rail were torn out (R., 17), but afterwards testified (R., 19 and 20) that he saw the dent where

the spikes were *pulled out*, and that there was no doubt the spikes were pulled out and it was not a matter of fixing the track and leaving them out; that the spikes from three cross-ties had been pulled, those in the first being pulled on both sides and in some others on the outside; that it looked like the train had been wrecked and there might be some tools around, and that afternoon witness found two tracks of men on a path leading from the wreck to a bluff 50 or 60 feet away, and followed it and found a wrench used for removing the nuts from angle bars and, also, a pull bar used for pulling railroad spikes, which were marked with Southern Railway marks and appeared to be Southern Railway tools (R., 15, 19, 20, 21, 165). While this wrench had some play, when used on the nuts of the Charleston & Western Carolina rail, witness tested it and it would hold enough to remove the nuts (R., 20). The nearest point on the Southern Railway from the wreck is about 5 or 6 miles (R., 21). Witness operated a gravel pit just beyond the place of wreck, and was there every day, except Sunday, and the railroad section forces did not work at the place of the wreck that week, but worked at or near there the week before (R., 16, 18).

As respondent's witness Randall crossed the railroad track in a wagon at Beech Island station (which is 1.3 miles from the wreck), about four or five o'clock on the afternoon before the wreck, he saw some section men working, like fixing a rail, between Beech Island station and the sand pit "way up the road", but witness does not pretend to say just where they were working (R., 24, 26); later this witness stated, in

answer to a leading question, that the men were working "in the vicinity" of the sand pit (R., 27). The sand pit is just beyond the wreck in the direction toward Augusta. See plat, Exhibit 4 (with record).

The following facts are taken from uncontradicted testimony for petitioner; four witnesses, including witness Dobson, who also testified for respondent, testified without contradiction that a person crossing the track at Beech Island station could not see the place of the wreck, *or see nearer than three-tenths of a mile to the point of the wreck,* on account of a five degree curve (R., 126, 129, 34, 58 and 165). This also appears from petitioner's Exhibit 4 (with record). The section foreman having charge of that section, on going to the wreck, found that the dents where the spikes were removed which held the rail which was removed, were freshly made with the heel of a bar (R., 42); the roadmaster in charge of that division of track found, upon going to the wreck that morning, that a rail had been taken out and the spikes holding it pulled out of the ties, and not mashed out, and the bolts taken from the angle bars and the rail shoved out of position; there were dents in the ties where the bar had *pulled* the spikes; the dents were not there before the wreck; the rail fastenings were lying on the ground or cross-ties, with the spikes scattered along at the end of the rail near the Augusta end, where they were taken out (R., 51, 52, 54). A planter, who lived at Beech Island and saw the wreck that morning (R., 55, 57), testified that one end of the rail going from Augusta was set in and the bolts and angle bars removed on the end of the rail toward Ellenton on one side and

the bolts or nuts were on the track near this end and the spikes had been drawn so as to set the rail in; the rail had been unbolted *and set in and was spiked down on the outside* (R., 56, 59, 61) and a wheel had hit the end of the rail toward Augusta (R. 60); he testified the rail had been pulled in out of line from one to three inches and spiked down (R., 61, 63); respondent's witness Dobson also testified that the rail had been pulled in and spiked down (R., 17, 18); the angle bars connecting this and the other rail had been entirely removed so that you could release the rail (R., 65). Petitioner's general roadmaster, who arrived at the wreck about 9:30 a. m., found that the right-hand rail had been removed, bolts and angle bars taken off and lying on the ground and that the spikes had been pulled clean and clear with a crow bar and the rail pushed out 6 to 10 inches from its original position (R., 77, 78, 79, 81, 82); the outside spikes of the removed rail were lying between the ties (R., 83); the flange mark on the ties was to the left of the rail, as it was lying after the wreck, and to the right of the original line of the rail (R., 84, 85). The engineer of maintenance of way of the Charleston & Western Carolina Railway Company, who arrived at the wreck at 5:30 a. m., found conditions with respect to the rail being removed and the bolts and spikes drawn, the same as that testified to by the other witnesses (R., 90, 91), but the bolts and nuts were in a pile at the end of the rail and the spikes were lying between the ties, near the original position of the rail (R., 91). Section foremen in pulling spikes, pull them clear and do not bend them, and are instructed to gather them

up and take them to the section house (R., 93); the spikes were drawn only on the outside of the rail removed (R., 94); with the spikes removed from one-half of the rail, it would not be possible for a train to pass over without getting off (R., 95). The wrecking foreman, who arrived at about 5:30 a. m., found that one rail was ripped up, with the spikes drawn, leaving a clean hole, not mashed out, and the rail shoved forward 7 or 8 feet (R., 109, 110). When spikes are mashed out by a wreck, the spikes will be crooked and the holes larger (R., 110). About eight spikes had been pulled from the inside of the rail just ahead of that removed and the spikes pulled from the rail removed were on the outside and you could see the heel print of crow bar where they had been pulled (R., 124). The engine and front trucks of the first car had passed over the place the rail was taken out of (R., 112, 113). A section master will break the bolts with a hammer in removing an angle bar and carry away the scrap (R., 114). The angle bars were removed from both ends of the removed rail and were lying near the joint where they came out (R., 115); the rail just ahead of the rail which was taken out, appeared to have been struck on the end (R., 118). The conductor of the wrecked train (R., 134, 137) found a rail disconnected, the angle bars off, with the bolts out, *and the nuts screwed off first*, and the spikes pulled from the outside of this rail, which was shoved forward 8 or 10 feet, with nuts, bolts and angle bars lying on the ground; only one rail had been tampered with, but that was enough to wreck the train. The flagman found about the same condition as to the bolts

and angle bars (R., 143); the spike holes in the cross-ties were clear under the part of the removed rail witness could see (R., 144). The vice-president and general manager of the Charleston & Western Carolina Railway Company at from 6:00 o'clock a. m. to 8:00 o'clock a. m. found that the rail had been removed from the track with the angle bars loose on either side of it and the spikes on one side of the rail removed and the rail pushed forward six or eight feet. He was struck with the fact that no effort appeared to have been made by the person to remove the rail to hide the fact that it was out of place (R., 147, 148); the angle bars and bolts were in good condition (R., 148); all of the bolts and spikes were taken out of the rail (R., 151), and a sectionman would not take them off in that way (R., 150); the end of the rail toward Augusta was disconnected, but this witness did not see where it had been pushed in and spiked down (R., 154), as some of the other witnesses had testified; the condition of the loosened rail caused the wreck (R., 155).

A passenger on the wrecked train, *who was also an inspector and special investigator for the Interstate Commerce Commission, with years of railroad experience,* both on that Commission and on a state railroad commission, and as a railroad trainman (R., 168, 170), examined the track immediately after the wreck and testified that one rail was out of place and the angle bars had been removed from each end of the rail and that an examination of the angle bars, bolts and nuts, which were lying close by, *indicated that they had been removed by someone on purpose;* the rail

vas six or eight inches out of alignment and bent; that he condition of the bolts showed that they had not been stripped in any way, and the track was in nearly perfect condition in its line and gauge (R., 169); that here was no indication that the condition of the track aused the rail to spread; the spikes pulled from the ies had been pulled directly upward, whereas there would have naturally been a slanting pull or a splinted tie, if they had been crushed out (R., 170, 172); *hat it would have been impossible for a whole train q have gotten over the track with the rail removed s it was* (R., 178).

Six trains, both freight and passenger, passed over he place of the wreck *in both directions* between the fternoon of May 19 and the time of the wreck at :10 a. m. May 20; these being: train to Augusta assed place of wreck about 5:30 p. m.; local freight rain passed there about 7:15 p. m. going to Augusta; reight train *from Augusta* passed point of wreck about :30 p. m.; passenger train to Augusta passed point f wreck about 6:20 or 6:15 p. m.; Charleston & Western Carolina Railway through freight to Augusta assed place of wreck about 1:25 a. m.; Atlantic Coast ine passenger train going West passed point of reck about 1:35 a. m. on May 20; and freight train *om Augusta* passed place of wreck about 12:30 a. m. ., 66, 67, 68, 70, 73, 74); the wrecked train left ugusta at 2:50 a. m. and reached the place of the reck about 3:10 a. m. (R., 75). The engineers of ese trains testified that they noticed nothing unual in passing over the point at which the wreck curred and observed no defect in the track. If

they had noticed any unusual condition, it would have been the duty of the engineer to report same (R., 96, 100, 102, 104, 105, 106, 107, 108). The roadmaster had carefully inspected this track as late as 5:30 p. m. on May 19 (R., 50); he rode over this track two or three times a week and these inspections were the customary method of inspecting track (R., 53, 54, 88, 89, 92). The inspection given to this track compares favorably with the inspection of railroad tracks generally, according to the testimony of the Interstate Commerce Commission's inspector (R., 71). The track at the place of the wreck had been newly timbered, bolted up and surfaced about two months, or less, before the wreck, and was then practically built over, new cross-ties put in, and the track had had time to settle (R., 32, 38, 50, 57).

On the afternoon of the wreck witness Dobson, who testified for both respondent and petitioner (R., 19, 20, 33, 65), in following two tracks of men in a path leading up the bluff, about 100 feet from the place of the wreck, found a wrench and a pull or crow bar which had on them the markings of Southern Railway ownership; the wrench would unscrew the nuts on the removed rail (R., 20); it was intended for use in removing bolts and angle bars from 80 pound rail, which was the weight of the rail in question (R., 163). One man could easily have loosened the angle plates on the removed rail and removed the spikes and moved the rail out of position, and could do so easily within an hour and a half (R., 86). On the morning of the wreck, May 20, the section foreman of the Southern Railway, whose section-house was about

four miles from the place of wreck, found that his section tool house had been entered some time the night before and a crow bar and a wrench taken therefrom. The Southern Railway's wrench, which was stolen, was of the same size as that used on the Charleston & Western Carolina Railway for handling 80 pound rail *and the Southern Railway section foreman identified the tools found near the wreck as being those stolen from his tool house* (R., 157 to 163).

Judgment was rendered for respondent in the sum of Twenty Thousand ($20,000) Dollars (R., 4), which judgment was affirmed by the Supreme Court of South Carolina on July 31, 1931, as shown by its opinion and judgment in the record, Cothran, J., dissenting (R., 201).

II.

Your petitioner earnestly contends that writ of *certiorari* should be granted by this court to review and reverse the judgment of the State Supreme Court herein because:

There is no substantial evidence whatever in the record to show negligence by the section force in maintaining the track at the place of wreck, as alleged, but the undisputed evidence tends strongly to show that the wreck was caused by the criminal acts of third persons.

*Norfolk & W. Ry. Co.* vs. *Gilespie,* 224 Fed. 316 (C. C. A., 4th Cir.);

*Savitz* vs. *Lehigh & N. E. R. Co.,* 199 Pa. 218; 48 Atl. 987;

*Atlantic Coast Line R. Co.* vs. *Davis, Admr.,* 279 U. S. 34.

WHEREFORE, because said decision and judgment of the State Supreme Court decided the foregoing Federal question in a way not in accord with the applicable decisions of this Court, your petitioner prays that a writ of *certiorari* be issued to the Supreme Court of the State of South Carolina, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that upon such review the said judgment of the Supreme Court of the State of South Carolina, be ordered reversed.

ATLANTIC COAST LINE RAILROAD COMPANY,

By THOMAS W. DAVIS,
DOUGLAS McKAY,
V. E. PHELPS,

*Attorneys for Petitioner,*
*Atlantic Coast Line Railroad Company.*

Wilmington, N. C., October 8th, 1931.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

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# No. 453

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ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

*vs.*

HANNAH R. TEMPLE, ADMINISTRATRIX OF THE ESTATE OF JOSEPH R. TEMPLE, DECEASED, RESPONDENT.

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## BRIEF FOR PETITIONER.

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### Official Report.

The decision of the Supreme Court of South Carolina has not yet been officially reported. It is found on page 201 of the record.

### Statement of Grounds of Jurisdiction.

The date of the judgment sought to be reviewed herein is July 31, 1931 (R., 201).

This action was brought, tried and decided under the Federal Employers' Liability Act of 1908, as

amended (R., 4, 7, 9, and opinion of the State Suprem Court, page 201 of record). Judgment was rendere for respondent herein in the sum of twenty thousan ($20,000) dollars and petitioner appealed to the Stat Supreme Court. The judgment was affirmed by th South Carolina Supreme Court (R., 201), Cothran, J dissenting (R., 205).

The jurisdiction of this Court is invoked under th Federal Employers' Liability Act of 1908, as amended and under Judicial Code, Section 237, as amended b Act of Congress September 6, 1916, Chapter 448, Sec tion 2, and Act of Congress February 13, 1925, Chap ter 229, Section 1.

The cases believed to sustain the jurisdiction of thi Court are:

*Atlantic Coast Line R. Co.* vs. *Davis, Admr* 279 U. S. 34.

*Gunning* vs. *Cooley,* 281 U. S. 90.

*Norfolk & W. Ry. Co.* vs. *Gillespie,* 224 Fed 316 (C. C. A., 4th Cir.).

*Savitz* vs. *Lehigh & N. E. R. Co.,* 199 Pa. 218.

## Statement of Case.

All of the relevant facts are fully set out in th petition, and will be stated in the body of this brie only in so far as may be necessary to a discussion o the question involved.

## ARGUMENT.

**There is no substantial evidence to show negligence by the section force in maintaining the track at the place of wreck as alleged in the complaint, but the undisputed evidence tends strongly to show that the wreck was caused by the criminal acts of third persons.**

This question is raised by petitioner's second and third exceptions (R., 200).

The sole question involved in this application for *certiorari* is the sufficiency of the evidence to sustain a finding of negligence as alleged in the complaint. The trial judge charged the law of the case under the Federal Employers' Liability Act, and properly charged (R., 188) that in order to convict the defendant railroad company of negligence, plaintiff must prove the existence of the defect complained of and that it was a defect of such a character as to cause its existence to be a negligent failure on the part of the defendant, proximately causing the injury. The State Supreme Court (R., 204) held that in accordance with the requirements of the Federal Act, the plaintiff assumed the burden of establishing negligence by defendant as to the acts alleged, and further held that the evidence in the case made the question of negligence one for the jury and sustained the judgment for respondent.

Before considering the sufficiency of the evidence to sustain the finding of negligence as alleged, it will be well to briefly refer to several decisions of this Court which petitioner believes are applicable to the

facts and judgment herein. In the case of *Atlantic Coast Line R. Co.* vs. *Davis, Admr.*, 279 U. S. 34, the Court, on page 35, reiterated this well-established proposition:

> "It is unquestioned that the case is controlled by the Federal Employers' Liability Act, under which it was prosecuted. Hence, if it appears from the record that under the applicable principles of law as interpreted by the Federal courts, the evidence was not sufficient in kind or amount to warrant a finding that the negligence of the railroad company was the cause of the death, the judgment must be reversed. *Gulf, M. & N. R. Co.* vs. *Wells*, 275 U. S. 445, 457; 72 L. ed. 370, 371, 48 Sup. Ct. Rep. 151, and cases cited."

In referring to the amount of evidence necessary to carry a case to the jury in the Federal Courts, this Court said, in the recent case of *Gunning* vs. *Cooley*, 281 U. S. 90-94:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' *Schuylkill & D. Improv. & R. Co.* vs. *Munson*, 14 Wall. 442, 448, 20 L. ed. 867, 872; *Pleasants* vs. *Fant*, 22 Wall. 116, 122, 22 L. ed. 780, 783."

The Court further said:

"Where the evidence upon any issue is all on one side *or so overwhelmingly on one side as to leave no room to doubt what the fact is*, the court should give a peremptory instruction to the jury." (Italics ours.)

"*'When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.'*"

Again, on page 95, the Court said:

"The burden was on plaintiff to establish the negligence and injury alleged; and, if the evidence failed adequately to support either element, defendant's motion should have been granted."

The State Supreme Court in its opinion (R., 205) held that the evidence led to the conclusion that the rail in question was left unbolted and unspiked by the section hands (as alleged in the complaint) and that it was not occasioned by some outside person as claimed by petitioner. Petitioner contends that a mere reading of the record shows that there is no evidence whatever to prove negligence in the respect alleged. On the other hand, both respondent's undisputed evidence, as well as the undisputed evidence of petitioner, tends to show that the wreck was caused by the acts of third persons for which petitioner would not be responsible. No one saw the removal or misplacement of the rail which caused the wreck,

and the evidence is therefore wholly circumstantial, making it necessary to briefly refer to the material evidence given on behalf of both parties. Only two witnesses testified for respondent, and the testimony of one of them (witness Dobson) tends to support the position of petitioner rather than that of respondent, as to the cause of the wreck (R., 10), while the testimony of respondent's other witness, Randall (R., 20), does not legally or logically tend to show who removed the rail or what caused the wreck. Respondent's witness Dobson (R., 13 to 23), was a merchant and farmer who lived at Beech Island, about a mile and a half from the wreck, and ran a gravel bed or pit located just west of the place of the wreck. He arrived at the wreck at 6:30 a. m. He testified that he found the rail torn up and the bolts and spikes were lying loose on the cross-ties and that the bolts and angle bars (R., 17) had been *removed* by somebody, and that the end of the rail removed was pulled in and "spiked in from the outside, and the track made too narrow." Only one other witness in the case appears to have testified that the rail was *spiked down out of line*, this being petitioner's witness Davies (R., 59). None of the other witnesses said that the rail was spiked down out of line and one of them said that it was not (R., 154). If the removed rail was so spiked down, as testified by respondent's witness, Dobson, this would seem clearly to indicate that the rail was removed by third persons for criminal purposes. It certainly cannot be assumed, without any substantial supporting evidence, that the section forces committed such a vicious and criminal act. In the absence of

contrary proof, the law presumes righteousness, rather than unrighteousness.

> "'The law presumes that every man, in his private and official character, does his duty; until the contrary is proved, it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption.'"
>
> *Cincinnati, N. O. & T. P. R. Co.* vs. *Rankin,* 241 U. S. 319-327.

Respondent's witness Dobson further testified that it was not merely a matter of fixing the track and leaving the spikes out, but that the spikes were "pulled" out (R., 20). A significant part of the testimony of this witness is that on the afternoon of the wreck, he was walking around at the place of the wreck and found two tracks of men on a path leading from the place where the rail was removed to a bluff some fifty or sixty feet away, and there found a wrench and pull bar, which were railroad tools and which bore on them marks of the Southern Railway and were used, respectively, for removing the nuts from angle bars and for pulling cross-tie spikes (R., 19 to 23). These same tools, which witness Dobson found so near the wreck, were stolen from a tool-house of the Southern Railway on the night of the wreck (R., 157-159). This tool-house is four miles from the point of the wreck (R., 160). He testified that the Southern wrench was slightly larger than the bolts and nuts on the removed rail and had some play, but that they tried it, and it would work and hold

enough to get the nuts off (R., 20). Dobson further testified for respondent that he was at his gravel pit every day in the week, except Sunday, and that the C. & W. C. section forces did not work at the place of the wreck that week, but worked at or near there the week before the wreck (R., 16, 18). Petitioner submits that there is nothing in the testimony of this witness to show that railroad section forces caused the wreck, but on the contrary, his testimony strongly shows that the wreck was caused by the criminal acts of third persons, who stole track tools from a nearby tool-house of the Southern Railway and removed and spiked in the rail out of line, thus causing the wreck.

The only other witness who testified for respondent was witness Randall. This witness was not at the wreck and his testimony was given about five years after the wreck occurred. He testified that as he crossed the railroad in a wagon at Beech Island station (which is 1.3 miles from the place of the wreck, R., 129) about four or five o'clock on the afternoon before the wreck occurred, he saw some section men working, like fixing a rail, between Beech Island station and the sandpit "way up the road", but this witness did not pretend to say just where the section men were working (R., 24, 26). Later on this witness testified, in answer to a leading question by respondent's counsel, that the men were working "in the vicinity" of the sandpit (R., 27). The sandpit is a few feet west of the place of wreck in the direction toward Augusta (R., 131.) The State Supreme Court

in its opinion held (R., 205) that it might be reasonably inferred from the testimony of this witness that the section men were working at or near the place of the wreck before it occurred a few hours later. Petitioner submits that the evidence of this witness will not support a finding that the section force was working at the very place of the wreck the afternoon before it occurred, and even if it would support such a finding, it would not support a finding that the section force removed the rail in question and spiked it in out of line. Giving Randall's testimony full effect, he only says that the section force was working "in the vicinity" of the sandpit. The quoted words taken from his testimony are merely relative and do not express any definite idea of distance. Words & Phrases, Volumne 8, page 7317. Randall was at Beech Island crossing when he thought he saw the section force, which is 1.3 miles from the place of the wreck; he says that he saw them between Beech Island station and the sandpit "way up the road", and under these circumstances his later expression that they were *in the vicinity* of the sandpit might mean that they were within one hundred feet of it, or within several hundred yards of it. It must be borne in mind that, according to respondent's contention, this witness was testifying as to men he claimed to have seen on the railroad track over a mile away, and it is perfectly apparent, giving full effect to his testimony, that in looking such a distance he certainly could not fix the exact point at which the section force was

working and probably could not do so within several hundred yards or more. Furthermore, we call the Court's attention to the fact that four witnesses, including witness Dobson, testified without contradiction that a person crossing the track at Beech Island station, from where Randall said he saw the section force, could not see the place of the wreck on account of a five-degree curve intervening and could not see nearer to the point of the wreck than three-tenths of a mile (R., 126, 129, 34, 58 and 165). This curve is shown on the map, petitioner's exhibit 4 (with record). No specific attempt was made to contradict the testimony of these witnesses, and we submit that under the rule hereinbefore quoted from the case of *Gunning* vs. *Cooley, supra*, the overwhelming weight of evidence and undoubted fact is that the witness Randall did not and could not see a section force at the place of the wreck from Beech Island crossing. Respondent's other witness, Dobson, who was at the sandpit every day, testified that the section force was not working at or near the place of the wreck that week, but was working there the week before the wreck and did some work for witness at the sandpit (R., 18). If the testimony of witness Randall were susceptible of the construction sought to be given it by the respondent and the State Supreme Court, namely: that the section force was working at the exact place of the wreck and fixing the removed rail the afternoon before the wreck, it is contradicted by the testimony of witness Dobson, and the rule of the Gunning case, *supra*, to

the effect that when plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither, would apply. This rule is also applicable to the whole case attempted to be made out by respondent, because undoubtedly the tendency of witness Dobson's testimony, as a whole, is to sustain the hypothesis that the wreck was caused by the criminal acts of third persons, and his testimony is certainly consistent with the hypothesis that petitioner was not negligent.

Further, in order to prove circumstantially by witness Randall's testimony that the section force removed the rail which caused the wreck, it is necessary to presume, or infer, one or more intermediate circumstances without any proof of such circumstances. Giving the fullest effect to Randall's testimony, it is that the section force was working on the afternoon before the wreck "in the vicinity" of the sandpit, which is very close to the point of wreck. To constitute this testimony circumstantial evidence that the section force removed the rail in question, it would be necessary to infer without proof: first, that they were working at the exact place and on the very rail which was removed, and second, that they actually removed the bolts and spikes from this rail and left it out of place so as to cause the wreck. There is no circumstantial evidence whatever in the record to prove these two further facts, and it is well settled under the decisions of this court that *whenever circumstan-*

*tial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed.*

*United States* vs. *Ross*, 92 U. S. 281.

*Manning* vs. *John Hancock Mutual Life Insurance Co.*, 100 U. S. 693.

*Chicago, M. & St. P. R. Co.* vs. *Coogan*, 271 U. S. 472, 477.

Petitioner submits, therefore, that witness Randall's testimony, taken by itself, or with respondent's other testimony is wholly insufficient to sustain a finding that the section force removed the rail in question. The testimony of Dobson, respondent's only other witness, affirmatively tends to point to a contrary conclusion.

The petitioner introduced a number of witnesses, both employees and non-employees, who testified to the condition of the track immediately after the wreck and also as to the condition of the track before the wreck. All of this testimony, as well as that of respondent's witness Dobson, clearly points to the same conclusion, with only such variations in the testimony of the several witnesses as to minor details which is usually found when a number of persons truthfully testify to the same facts. As appears from the detailed summary of the testimony in the petition, petitioner offered the testimony of the section foreman in charge of that division of track, as well as the testimony of a number of trainmen and maintenance of way officers of both the Charleston & Western Carolina Railway Company and of petitioner. All of these

witnesses (as well as respondent's witness Dobson) testified without contradiction that the spikes of the removed rail were *pulled* out, leaving clear holes, and were not mashed out. The significance of this testimony, as explained by witness Johnson (R., 172, 173), who was an experienced special investigator for the Interstate Commerce Commission and a passenger on the train, is that had the spikes not been pulled out and had been crushed or mashed out upon the flooring of the rail by the weight of the wrecked train, "it would naturally have made a slanting pull or splintered the tie, but they were pulled out straight." This circumstance, we submit, clearly indicates that the rail was removed intentionally and deliberately before the wreck occurred. The bolts, nuts and angle bars of the rail which had been removed and misplaced were lying on the ground between the ties or near the ends of the ties where they were removed. One witness, the engineer of maintenance of way of the Charleston & Western Carolina Railway, testified (R., 91) that the bolts and nuts and locks were in a pile at the end of the rail. The conductor of the wrecked train (R., 134 to 137) testified that the nuts had been *screwed off first* and the spikes pulled from the outside of the rail which was shoved forward about eight or ten feet, and the nuts, bolts and angle bars were lying on the ground. The flagman testified to about the same conditions as to the bolts, angle bars and rail (R., 143). Two witnesses testified, without contradiction, that a section foreman in removing a rail and in taking off

the bolts and angle bars would not take them off in that way, but would ordinarily break the bolts with a hammer and carry away the scrap (R., 150, 114). One of the petitioner's witnesses testified, in agreement with the testimony of respondent's witness Dobson, that the bolts and nuts had been removed and the rail had been "set in and was spiked down on the outside" (R., 56, 59, 61). The special investigator of the Interstate Commerce Commission, above mentioned, as well as some of the railroad employees, expressly testified that the condition of the track and angle bars and bolts *indicated that they had been removed by someone on purpose* (R., 169). We submit, therefore, that this testimony, which is wholly uncontradicted and is supported by respondent's own testimony, shows clearly that the removal of the rail was intentional and deliberate, thereby negativing any possibility that the wreck could have resulted from the bad condition of the track or from any neglect of a section force in failing to adequately spike the track. In fact, the special investigator for the Interstate Commerce Commission testified that there was no indication that the condition of the track caused the rail to spread (R., 170). This witness investigated this particular wreck and afterwards made an official report to the Interstate Commerce Commission concerning it (R., 174), so that his testimony is entitled to the highest credence, both on account of his large experience in such matters, as well as his official position and duties with the Interstate Commerce Commission.

His testimony agrees in all material matters with that given by petitioner's other witnesses.

If the rail was deliberately removed by someone, thus necessarily causing the wreck, the only remaining question is whether there is any substantial evidence that this was done by the section force of the Charleston & Western Carolina Railway. We have shown that the testimony of respondent's witness Randall will not sustain such a finding and that of respondent's witness Dobson affirmatively tends to show, in connection with parts of petitioner's undisputed testimony, that the rail was removed by third persons for criminal purposes. Petitioner's undisputed testimony supports this theory. It will be recalled that respondent's own witness Dobson testified that on the afternoon of the wreck he followed the tracks of men in a path leading from the wreck to a bluff some fifty to one hundred feet away and there found a wrench and crow bar which had on them the markings of Southern Railway ownership, and that this wrench would unscrew the nuts on the removed rail. This testimony is given the highest significance by the testimony of the section foreman of the Southern Railway, introduced by petitioner, who had charge of a section of that railway and whose section-house was about four miles from the place of wreck. He testified that on the morning of the wreck, May 20, he found that his section tool house had been entered sometime during the night before and a crow bar and track wrench taken therefrom and he *identified the*

served no defect in the track (R., 96, 100, 102, 104 to 108). The track itself had been carefully inspected by the roadmaster of that division as late as 5:30 p. m. on May 19 (R., 50), and no defects found. The inescapable conclusion from the foregoing undisputed facts is that the rail was not removed by the section force of the Charleston & Western Carolina Railway on the afternoon before the wreck, but that it was removed by some unknown third person or persons with deliberate and criminal intention on the night of the wreck and within approximately an hour and a half to two hours and a half before the wreck; otherwise the through freight train which passed the place of wreck about 1:25 a. m. and the passenger train from Augusta which passed about 12:30 a. m., could not have passed over the track at this point and would have been derailed, as was the wrecked train. The undisputed evidence is that one person could easily have taken off the angle bars and bolts and removed the rail in question *in less than one hour and a half* (R., 86). It is plain, therefore, that the person or persons whom the evidence tends to show stole the necessary tools from the Southern Railway tool-house, would have had ample time to remove the rail after the last train before the wreck passed that point at 1:25 a. m.

In this connection, we desire to comment briefly on an argument made in the opinion of the State Supreme Court in its attempt to explain the fact that trains that passed over the place of the wreck going in the direction of Augusta during that night passed

over safely without derailment. It refers to testimony of respondent's witness Dobson (R., 14, 15), to the effect that the flanges or angle plates were on the Augusta end of the removed rail and that there was a dent about the middle of that rail. It then quotes a question asked witness Dobson as to whether a train *going toward Augusta* would hit the rail that way and quotes his answer to that and the following question:

> "No sir, it would push it back in, it looks like."
>
> Q. "But one coming from Augusta would hit it?"
>
> A. "Yes sir."

The State Supreme Court then draws this conclusion:

> "If this be true, a train going over the rail in question in the direction of Augusta would not be wrecked, and this accounts for the facts that the trains that passed over the place going in the direction of Augusta during the same night, passed over safely."

The testimony of witness Dobson, quoted by the State Supreme Court, that a train going toward Augusta would not hit the rail so as to dent it in the middle, but one going from Augusta would so hit it, does not at all justify the conclusion of that Court that a train going in the direction of Augusta *would not be wrecked.* All that this testimony does tend to prove, if anything material, is that the rail was not out of place when the last train going to Augusta had

passed that point, which was 1:25 a. m., or an hour and forty minutes at least before the wreck occurred. This vitiates the further conclusion of the State Supreme Court above mentioned. Furthermore, this argument of the State Supreme Court wholly ignores the undisputed fact that *two* trains did pass the place of the wreck *coming from Augusta*, as did the wrecked train, these two trains passing the place of the wreck at about 6:30 p. m. May 19 and 12:30 a. m. May 20, respectively (R., 67, 74). The last train passed only about two hours and forty minutes before the wreck. The train coming from Augusta which passed the place of the wreck about 6:30 p. m., passed another train, either No. 45 or No. 15, at Beech Island, and the passing track is about a mile from the wreck (see map, Ex. 4, with record) (R., 68, 70), and it is not entirely clear from the record whether this train used the pass track or the main line, but the fact remains that the train coming from Augusta which passed the place of wreck at 12:30 a. m., two hours and forty minutes before the wreck, did not pass another train and hence went over the track where the rail was afterwards removed (R., 71). So that it is clear that at least one train, going in the same direction as the wrecked train, went over this track within less than three hours before the wreck, and the other four or five trains went over the place of wreck between the time the section force quit work and the time of the wreck. All of this demonstrates that the rail must have been tampered with after the last of these trains went over the track.

The only other attempted argument or reason given

for its decision by the majority of the State Supreme Court is the following:

> "It is hard to conceive of a person bent on mischief taking time enough to arrange the bolts and spikes in the order in which they were found and to have done the other acts in the manner described by witnesses. On the other hand, it may be reasonably inferred from all of the facts and circumstances that the section hands left the work at that place unfinished the evening before the wreck occurred."

This comment does not find any support in the evidence and seems to us to be without any basis in the light of common experience. All that the evidence showed as to the condition of the bolts and spikes and angle bars, is that they were thrown out and piled between or near the ends of the ties where they were taken off, and it is not unreasonable to believe that persons removing the rail to wreck the train would pile the bolts and spikes on the track where they took them off. On the other hand, the affirmative testimony is that section forces in removing these things would not do it in this manner (R., 114, 150). The State Supreme Court, except as heretofore mentioned, does not designate a single fact which leads to its conclusion that the section hands removed the rail and left it in that condition, and we submit there are no facts justifying this conclusion.

Petitioner has summarized and discussed all of the material facts in the case. It will be observed that most of these facts are testified to by persons who are

not employees of the petitioner, namely, respondent's witness Dobson, the officers and employees of the Southern Railway Company and Charleston & Western Carolina Railway Company, a planter living near the wreck, who examined it shortly thereafter, and a special investigator of the Interstate Commerce Commission. The only material facts testified to by petitioner's own employees, which are not also shown by other testimony, are those given by its dispatchers, who testified to the schedule of the trains passing over the track and the testimony of petitioner's engineers who operated those trains. Their testimony is uncontradicted and there is certainly nothing inherently improbable in any of it. The testimony of these employees is therefore entitled to as much credibility as that of other witnesses. *Chesapeake & Ohio Ry. Co.* vs. *Martin*, decided by this Court April 13, 1931.

It is difficult to find authorities very closely in point on the facts in such cases as this, as the physical facts of a wreck necessarily differ in every case. However, we wish to call the Court's attention to the case of *Norfolk & W. Ry. Co.* vs. *Gillespie*, 224 Fed. 316 (C. C. A., 4th Cir.). The action here was for the death of an engineer which occurred by reason of a derailment and one ground of negligence relied on was in allowing a low joint or uneven place in the track. We quote from the opinion of the court on page 323:

> "The witness Combs testified that the engine rocked, or went up and down, and that a low joint would cause such motion. The engineer of the rear engine on the same train testified that

> the first sign he saw of danger was the tender leaning off to one side. The apparent rocking of the engine and leaning of the tender would be insufficient evidence from which to infer that there was a low joint in the track, for this appearance might have been produced by other causes, such as very high speed on a curve or defects in the wheels or trucks. Inspection after the accident did not disclose a low joint. *A conclusion under these circumstances that there was a low joint, and that it was the cause of the derailment, would be based on conjecture.*" (Italics ours.)

The court held that a verdict based on this evidence would be based on conjecture alone, and yet the facts mentioned by the court undoubtedly constituted more of a semblance to, or scintilla of, evidence than any evidence to be found in the present record on the question of negligence relied on.

We may also mention the case of *Savitz* vs. *Lehigh & N. E. R. Co.*, 199 Pennsylvania 218, which involved the derailment of a train by running through a switch into a sidetrack, and the negligence alleged was that defendant allowed a switch which connected the main line with a siding to be out of repair and unlocked, by reason of which the engine was deflected to the sidetrack. In referring to the insufficiency of the evidence to establish this negligence, the court said:

> "The witness was an engineer, who had been in the employ of the Central Railroad a number of years on the branch road on which the accident happened. He testified that it was his custom to run slowly as he approached the

switch, that he might see that it was properly set before he reached it; that at one time a spike had been used to hold the rail of the switch close to the main track, and that when the spike was removed an opening could be seen between the rails. From this he inferred that the spring was weak, or that the end of the rail was bent. He had never inspected the switch, nor made any examination, except by looking at it as he passed on his engine. He had never stopped at the point, nor been delayed by the condition of the switch. Although passing daily, he had not observed the condition of the switch within two weeks or more of the accident, and he did not state what its condition was when he last observed it. His testimony as to the existence of a defect in the switch, as to its character, and as to the time when he had observed it, was exceedingly vague, and it appeared that his reason for running slowly as he approached the switch was that he feared that, as at times it was unlocked, boys might interfere with it. Giving to this testimony the fullest effect in the plaintiff's favor that can reasonably be claimed for it, it showed only that at a period two weeks or more before the accident the rails were not close together, the extent of the separation being defined by the expression of the witness 'You could see in there. It didn't lay tight.' If the case had been submitted on this testimony, the jury would have been left to find that, because the rails did not fit closely two weeks before, there was a defect sufficiently serious to cause the accident, and then to infer (1) that the defect continued although no one had seen it in the meantime, *and its existence was not disclosed in the constant*

> *use of the road;* (2) that the defect did cause an accident which with equal probability could be attributed to any one of several other causes for none of which was the defendant liable. *This would have been mere conjecture and wholly insufficient to sustain a verdict in favor of one on whom the burden of affirmative proof of negligence rested.* (Italics ours.)

The evidence set out in this Pennsylvania case was more definite and to the point at issue than any evidence in the instant case, but the reasoning and conclusion of that court is applicable to our case; in other words, in neither case can a jury properly make a finding of negligence without basing inference upon inference and without any supporting testimony.

The circumstantial evidence in this case, when fairly considered, does not rise to the dignity of showing that the acts of the section forces *might* have been one of the *possible* causes of the wreck, but if the testimony did go to this extent, it is well settled by the decisions of this Court that it is not sufficient for the employee to show that the employer *may* have been guilty of negligence, but "the evidence must point to the fact that it was." *Patton* vs. *Texas & Pacific R. R. Co.*, 179 U. S. 658.

Petitioner would call the attention of the Court to the full and accurate discussion of the law and facts of the case in the dissenting opinion of Cothran, J. (R. 204), which we think states the true rule of decision in the case.

Petitioner, therefore, submits that there is no substantial evidence whatever in the record to sustain

a finding of the existence of the negligent acts alleged and relied on by respondent. On the other hand, even if the burden were on petitioner to exculpate itself from negligence, which it is not, the evidence as a whole would fairly and amply sustain a finding that the wreck was not caused by any acts of the section forces, but was caused by the deliberate and criminal acts of unknown third persons. This application should therefore be granted and the judgment herein be reversed by this Court, to the end that petitioner may be relieved of the very substantial burden thereby imposed upon it.

Respectfully submitted,

THOMAS W. DAVIS,
*Wilmington, N. C.*
DOUGLAS McKAY,
*Columbia, S. C.*
V. E. PHELPS,
*Wilmington, N. C.*
*Attorneys for Petitioner,*
*Atlantic Coast Line Railroad Company.*

Wilmington, N. C., October 8, 1931.

*tools found near the wreck by respondent's witness Dobson as being the tools stolen from his tool-house* (R., 157, 158, 159). This is a strong circumstance that some person or persons (inferentially two men, since the tracks of two men were found near the track) with criminal intent broke into the tool-house of the Southern Railway on the night before the wreck, removed these tools and went to the place of the wreck within an hour or more before the wrecked train reached this point and removed the rail in question, causing the wreck and the unfortunate death of the intestate. To argue, as respondent and the State Supreme Court attempt to do, that the evidence supports a finding that the rail was tampered with and removed by the section force, rather than third persons, is to shut the eyes to much undisputed and credible evidence in the record and to imagine facts where none exist.

This contention of respondent and the conclusion of the State Supreme Court is further rendered wholly untenable by other undisputed evidence in the record. This evidence is that *six* trains, both freight and passenger, passed over the track at the place of the wreck going *in both directions* between 5:30 p. m. May 19 and 3:10 a. m. May 20, at which latter time the wreck is supposed to have occurred. One of these trains passed the place of wreck about 5:30 or 5:35 p. m. going to Augusta; a local freight train going to Augusta passed the point of the wreck about 7:15 p. m.; another freight train *from Augusta* passed there about 6:30 p. m.; a passenger train going to Augusta passed

over the place of wreck about 6:20 p. m. or 6:15 p. m.; the Charleston & Western Carolina through freight going to Augusta passed the place of wreck about 1:25 a. m. (about one hour and forty-five minutes before the wreck); Atlantic Coast Line passenger train going toward Augusta passed the point of wreck about 1:35 a. m. on May 20, and a freight train *from Augusta* passed the place of wreck about 12:30 a. m. May 20, or about two hours and forty minutes before the time of the wreck (R., 66, 67, 68, 70, 73, 74). The wrecked train itself left Augusta at 2:50 a. m. and reached the point of the wreck about 3:10 a. m.

It is perfectly apparent, even to a layman or one having no specific or expert knowledge of such matters, that these trains could not have passed over the track at the place of the wreck without derailment with the track in the condition it is shown by the testimony to have been. This conclusion is confirmed by the positive and undisputed testimony in the case. The special investigator for the Interstate Commerce Commerce, witness Johnson, testified that it would have been *impossible* for a whole train to have gotten over the track with the rail removed as it was, and that the same was, of course, true of four or five trains (R., 178). Petitioner's general roadmaster testified to the same effect (R., 78). It was the condition of the loosened rail which caused the wreck (R., 152). Furthermore, the engineers of these trains testified that in passing over the track at the place of the wreck, they noticed nothing unusual at that point and ob-

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# Supreme Court of the United States

No. 453

*ATLANTIC COAST LINE RAILROAD COMPANY,*
*Petitioner,*

*against*

*HANNAH R. TEMPLE, Administratrix of the Estate of Joseph R. Temple, Deceased, Respondent*

## Brief of Respondent in Opposition to Petition for Writ of Certiorari

JOHN F. WILLIAMS (Williams, Croft & Busbee), Aiken, S. C.
R. E. WHITING, Columbia, S. C.,
*Counsel for Respondent.*

THE R. L. BRYAN CO., COLUMBIA, S. C.
11-19-31-60

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## STATEMENT OF THE CASE

This case (arising under the Federal Employers' Liability Act for the death of Jos. R. Temple, Engineer, in the employ of the defendant, who, while operating a passenger train leaving Augusta, Ga., for Sumter, South Carolina, was killed in a wreck caused by the derailment of his engine) was brought by plaintiff in Florence County, where the intestate had lived; the Town of Florence, the County Seat, being also a central point of defendant's railroad operations.

Mr. Arrowsmith, an attorney of the Florence bar, represented the plaintiff in bringing the suit, was connected with the case throughout the proceedings in the State Court; but has died since argument in the State Court; and, therefore, his name does not appear on the brief filed by respondent in this case.

The case was removed at the instance of the defendant to Aiken County, where the wreck had occurred; where presumably jurors from the vicinage would be less likely to be swayed by any consideration or friendship for the deceased, or sympathy for his orphaned and helpless children; and where local witnesses, employees of the defendant company, or others who had observed the conditions at the scene of the wreck, might be expected to have more weight before the jury in their testimony.

The earning capacity of deceased was from $225.00 to $250.00 per month at the time of his death (folios 31, 374); he had three children (whose ages were, respectively, nine, eleven and fourteen years); and his mother (then about seventy years old) was living with him, taking care of his children (folios 21, 22).

The specifications of negligence relied upon by plaintiff will be found on page 3, folios 10-11, of the transcript of record. It is there alleged that employees of defendant, working on the track on the afternoon before the accident, failed to properly spike and bolt one of the rails and failed to keep

the same properly spiked and bolted, and that, when the engine and cars came upon this rail, it did not hold in the position it should have held to support the engine and cars, but one of the rails spread, thus causing the engine to turn over and the resultant death of plaintiff's intestate.

In defendant's answer, it is admitted (folio 21) that one of the rails on the track at the point where the accident occurred did not hold; but negligence on the part of defendant was denied; and defendant alleged that the defective condition of the rail was caused by malicious act.

An affirmative defense was also set up in the answer (folios 24-26) setting out defendant's contention that the derailment was the result of malicious act, and that investigation instituted by defendant led to the arrest of one George Rivers and his conviction for the wrecking of the train.

On trial of the case, defendant made no effort to prove motive for the vandalism alleged to have caused the derailment, and did not, otherwise than by offering to introduce the Court record of the conviction of George Rivers, make any effort to prove that George Rivers (a negro) was anywhere near the wreck or had any connection with it. Defendant offered, however, the Court record of the George Rivers case to prove his conviction. This was excluded by the trial Judge (folio 705).

The record of the Governor's pardon issued to George Rivers, which was offered in evidence by plaintiff following the effort of defendant to introduce the record of his conviction, was likewise held inadmissible (folio 706).

The derailment occurring about 3:10 A. M. a few miles from Augusta, and the railroad officials there receiving prompt notice, a number of such officials (the superintendent, roadmaster and wrecking foreman of the C. & W. C. R. Co., an affiliated company owning the railroad tracks on which the wreck occurred, were at the place of the wreck by 5:30 A. M. It does not appear from the record, however, that the plaintiff, living at Florence, S. C., with the three small children of the deceased engineer, a long distance away

from the place of the wreck, was even notified by the railroad company of the accident; or that she had any opportunity to make investigation of the cause of the derailment before the wreckage was cleared up.

The plaintiff's reliance at the trial was, therefore, quite naturally based solely on testimony concerning the occurrence of the accident and the surrounding circumstances.

Of the two witnesses called upon to testify for plaintiff, one of the witnesses, Dobson, had been summoned by defendant. The explanation made however by the defendant concerning the circumstances of the derailment did not satisfy the jury; and a verdict was awarded against defendant in the sum of $20,000.00. The trial Judge refused defendant's motion for a new trial. The defendant did not, and could not, complain of the charge. The appeal to the Supreme Court related to the sufficiency of the testimony; there were no exceptions argued to the rulings of the Judge on the trial or to his charge.

The case now comes on petition for *certiorari* to this Court on assignment of error wherein petitioner contends that, "there is no substantial evidence whatever in the record to show negligence by the section force in maintaining the track at the place of the wreck, as alleged, but the undisputed evidence tends strongly to show that the wreck was caused by the criminal acts of third persons."

## ARGUMENT

### *Summary of Argument*

Since the single issue of this case is the sufficiency of the testimony to make out a case justifying submission to the jury, an analysis of the testimony has been made at considerable length. Black type has been used to emphasize parts of the testimony that are deemed most pertinent to call attention to conflicting statements of witnesses or circumstances permitting inferences favorable to plaintiff.

As applicable to the consideration of the testimony, respondents' argument, with supporting authorities, is, in substance, as follows:

**(I)**

**The occurrence of the derailment and the surrounding circumstances permitted an inference of culpability on the part of the defendant; made out plaintiff's prima facie case; and presented a question of fact for the defendant to meet with an explanation.**

**Supporting Authorities:** *Southern Railway Company-Carolina Division v. Bennett, Admrx.*, 233 U. S., 80, 85 (affirming 98 S. C., 42); *San Juan Light Company v. Requena*, 224 U. S., 90, 98; *Spokane & Inland R. Company v. Campbell*, 241 U. S., 497, 505; *Travelers Insurance Company v. McConkey*, 127 U. S., 661, 667; *Sweeney v. Erving*, 228 U. S., 233, 240; *Wright v. Railroad*, 127 N. C., 225, 229; *Winslow v. Norfolk Hardwood Company*, 147 N. C., 275, 276; *Duvall v. Receivers S. A. L. Railway*, 152 N. C., 524 (Writ of error dismissed, 225 U. S., 477); *Stewart v. Railroad*, 157 N. C., 687; *Wallace v. Power Company*, 176 N. C., 558; *Craig, Admr. v. Suncrest Lumber Company*, 185 N. C., 560; *Chicago, etc., R. Company v. Irving* (C. C. A., 9th Circuit), 234 Fed., 562; *Manning v. Chicago, etc., R. Company*, 135 Minn., 229; *Conner v. Atchison, etc., R. Co.*, 189 Cal., 1; The Columbia, 25 Fed. (2d) 516 (affirmed by Circuit Court of Appeals, 2nd Circuit, 25 F. [2d], 518); *American Glycerine Company v. Brown* (C. C. A., 5th Circuit), 30 Fed. (2d), 316; *Chesapeake & O. R. Company v. Smith* (C. C. A., 6th Circuit), 42 Fed. (2d), 111; *Chesapeake & O. R. Company v. Wells* (C. C. A., 6th Circuit), 49 Fed. (2d), 251; *Baltimore, etc., R. Company v. Hill*, 84 Ind. App., 354 (Certiorari denied, 273 U. S., 738); *Central R. Company v. Peluso* (C. C. A., 2nd Circuit) 286 Fed. 661 (Certiorari denied, 261 U. S., 613); *Plumb v. Richmond Light & R. Company*, 233 N. Y., 285.

**(II)**

**The explanation offered by defendant left issues of fact for the jury; the proof being conflicting; and the circumstances testified to justifying countervailing inferences and suggesting doubt as to much of the testimony.**

**Supporting Authorities:** *Chicago, etc., R. Company v. Irving* (C. C. A., 9th Circuit) 234 Fed., 562; *Southern Railway Company, Carolina Division, v. Bennett, Admrx.*, 233 U. S., 80; *Spokane & Inland R. Company v. Campbell*, 241 U. S., 497, 505.

**(III)**

**The failure of defendant to produce at Court the tools discovered at the place of the wreck (a discovery relied upon by defendant as evidencing the malicious act of a third person as cause of the derailment) lays defendant open to the suspicion that the stronger evidence afforded by the production of the tools at Court (so that a test could have been made to see whether the wrench had been, or could have been, used on the nuts that were taken off the bolts holding the rail in place) would have been to deendant's prejudice.**

**Supporting Authorities:** *Clifton v. United States*, 4 How., 242, 248; The Frances, 8 Cranch, 348, 353; *Brig Struggle v. United States* 9, Cranch, 71, 74; *Runkle v. Burnham*, 153 U. S., 216, 225.

**(IV)**

**The issue, depending on the effect or weight of the evidence offered in rebuttal of the prima facie case made out by plaintiff, was one to be decided by the jury.**

**Supporting Authorities:** *Gunning v. Cooley*, 281 U. S., 90, 94; *Chesapeake & O. R. Company v. Martin*, 283 U. S., 209, 214; *Chicago, etc., R. Company v. Irving* (C. C. A., 9th Circuit), 234 Fed., 562.

In *Chicago v. Irving, supra,* where a *prima facie* case was made out by showing that there was a derailment which caused the injuries complained of, and the railroad produced circumstantial evidence tending to show that the derailment was not due to its negligence in track inspection, but to vandalism, it was held that the question of negligence was wholly for the jury, and was properly submitted by instruction requiring plaintiff to show negligence by a preponderance of the evidence. Examination of the case shows that in many respects the circumstances and proof in connection with the derailment were closely similar to the circumstances and proof in the case at bar. The case is one, therefore, which seems of the highest value in this consideration. In discussion of the sufficiency of the testimony to warrant the submission of the case to the jury, the Circuit Court of Appeals said:

"The defendant carrier offered its evidence. Whether it met or made a stronger case than plaintiff made was for the jury to say under proper instructions by the Court. . . . The defense relied upon evidence largely circumstantial, tending to show that some person unknown to it had deliberately pulled some spikes, removed angle bars, and displaced a rail. This may have been a correct way of accounting for the derailment, but the reasonableness of such a conclusion was evidently not clear to the jury and to the District Judge, and, as we read the testimony, is by no means a satisfactory explanation to us. The testimony of the method and times of inspection showed that the duty of the inspector was to inspect four tracks, each one being between 1½ and 2 miles in length, and that he devoted two hours daily to the work. The jury were not obliged to accept it as a fact that in such an inspection the one making it could and would detect the joints and bolts on the rails of the several tracks; nor were they obliged to believe that the roadmaster's inspection made on a fast-moving car was a sufficiently vigilant method to have discovered such a defect as the jury found must have existed. The whole ques-

tion of whether there was negligence became one for determination by the jury. *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S., 401, 19 Sup. Ct., 233, 43 L. Ed., 492. They saw the principal witnesses and heard them give their testimony; and it was for the jury to say whether the defendant rebutted the *prima facie* case of the plaintiff."

## ANALYSIS OF TESTIMONY

Plaintiff's witness, Dobson (who was subpoenaed by both sides), swore that he is proprietor of a gravel pit and runs a mercantile business at Beech Island; he got to the wreck about 6:30 o'clock in the morning; the engine and tender and two coaches were off and everything that could burn about the engine had burned off. The plaintiff's intestate had been removed (the wreck had occurred some three hours before).

Besides seeing that the rail was all bent up Mr. Dobson saw spikes and bolts where the track was loose, lying on the cross-ties; that three or four ties "were taken loose"; and he thought that the "flanges or angle plates were on the Augusta end of the rail." An angle plate has six bolts in it, three in each end of the rail. There was a dent and it looked as if it had been pushed in and you could see the dent about the center of the middle of the rail.

**"Q. A train going towards Augusta would not hit the rail that way?**

**"A. No sir, it would push it back in, it looks like.**

**"Q. But one coming from Augusta would hit it?**

**"A. Yes, sir."**

This witness was around the scene of the wreck pretty well all day and he did not know who mentioned it but thought he mentioned it himself that the train looked like it had been wrecked and there might be some tools. He went back and looked (folio 48), and found the place where somebody walked out, two people, and found a crowbar that you could pull spikes with and a wrench. These were

lying out behind some little bushes, just off the right of way in a gravel pit that had been dug there for some time. He did not recall seeing the section hands working there that week but thought he had seen them working there about the week before. He owned a gravel pit and had seen the section hands working there the week before and they had done some work for him, too. This witness said in referring to the rail (folio 57), "it had to be spiked in so that the wheel could hit it to make that dent," answering a question on cross-examination; and on said cross-examination he said he thought he had seen Mr. Leach (the Section Master), there with his hands the week before "and did some work for me in the pit"; he said he did not remember seeing them there the day before (folio 58). Appellant's counsel asked this witness "Q. Don't you know that Mr. Leach was working up the road a mile or two? A. No, sir; I don't know that. Q. You just know they had not worked there that week? A. Yes, sir."

Witness said the tools were about as far from the track as the wall on the opposite side of the court house, fifty or sixty feet and that the crowbar had the Southern's name indented and he saw in the ties the dent where the spikes had been pulled and appellant's counsel asked (folio 65), "It was not a matter of fixing the track and leaving them out? A. No, sir; they were pulled."

On re-direct examination this witness said the spikes and about three ties had been pulled and answered the question.

"Q. They were not pulled on both sides?

"A. I think the first one was pulled on both sides, and some were in there on the outside. It pulled on both sides, and some were in there on the outside. It pulled them on the inside where it could go in," the "it" meaning the rail evidently. Then in answer to the question:

"Q. How many of the spikes did you see there?"

The witness said:

"A. I didn't count them, but it looked like three or four." He never found the tools until about two or three o'clock in the afternoon (folios 70-71), and he always knocked off his work about two o'clock. He said the crowbar was about all he wanted to tote to a little office of his and he further said the scene of the wreck was between the crossing and Beech Island Station about a mile and a half or two miles and was right at his gravel pit. He said he could see where two tracks went up the bank (folio 76), but did not follow them. The railroad men did.

Then on re-direct examination (it will be recalled this witness was summoned by the railroad), the witness said:

"Q. You said there were two tracks?

"A. Yes.

"Q. Had many people been there that morning?

"A. Yes, sir; a big crowd.

"Q. They had been walking around and looking?

"A. Yes, sir."

**This testimony shows that the bolts were pulled neatly and that the first one was pulled on both sides (speaking of the tie now) and some were in there on the outside. "It pulled them on the inside where it could go in." He did not count the spikes but it looked like three or four. Hence, the testimony shows that all the spikes, three or four that had been removed and not put back, were lying on the cross-ties as any section master would draw them and the ones on the outside, except as to one tie, were intact in the ties; that there was a dent in the end of the rail that the flange of a wheel would strike when a train was going out of Augusta and it appears from the dent that the flange actually did strike to the center of the end of the rail; and the angle plates on the Augusta end were on.**

His testimony refers to the tools that were found off the right of way belonging to the Southern Railroad that had been brought four or five miles, the crowbar being as much

as Mr. Dobson cared to tote; and notwithstanding large crowds had been there that morning walking around looking, between two and three o'clock in the afternoon, just about 12 hours after the wreck, tracks were plainly traced by Mr. Dobson and the railroad men from the scene of the wreck to where the tools were found.

C. M. Randall (folios 78-95), says: That he was not at the wreck; that he knows where the gravel pit is between the crossing and Beech Island station and that the gravel pit is in sight of the other crossing (folio 80).

That he had a hay field between the railroad and the river when this wreck occurred, and that he remembered when he heard of the wreck that what he had seen the afternoon before was fixed on his mind, namely, some section hands working up the railroad, about four or five o'clock, working like fixing a rail; that he never paid much attention to them at the time, and had seen them so much, having been crossing often for about a year (folios 82-84).

Mr. Randall was positive that he saw the men working the day before (folio 89), about the Beech Island crossing and between there and the sand pit. He was in a wagon.

At this point a motion was made for a nonsuit on the ground that there had been insufficient evidence of actionable negligence to warrant submission of the issues to the jury. The presiding Judge said there was enough to go to the jury; but he supposed a motion would be made to direct a verdict and that he would pass the whole thing.

## DEFENSE TESTIMONY

Mr. Leach (folio 104) was the section man in charge of the road where the wreck occurred and flatly contradicting Randall, he said, when asked if his hands had worked at the scene of the wreck at any time before: "No, sir; it had been sixty days." It will be noted that Mr. Dobson had testified that they had worked there the week before; but Leach even contradicts him.

Speaking of the time and manner of finding the tools, Leach said (folio 119): "A. Mr. Dobson called my attention to it. He found them in my sight. He walked off and tracked the tracks." It will be noted that either Dobson or Leach is mistaken about the time when the tools were found, for while Dobson said it was three P. M. the same day of the wreck, Leach said it was the second day afterwards (folio 141). At any rate it was certainly interesting to a jury to know how tracks could be made from a wreck to tools even twelve hours after the wreck, when large crowds had attended the wreck, to find tools hid away near the scene of the wreck, and when those tools had to be brought four or five miles. The jury simply did not accept the theory suggested to them that the wreck was caused by some unknown person, who had no motive whatever.

Mr. Leach undertook to contradict Randall, who was very irritating to the defendant's witnesses when he said he saw the section hands working in the vicinity of the wreck, working on the rails; in his effort to contradict Randall, Leach said that Randall would have to have crooked eyes "as there is a stiff curve in there," if he could see from what we call the Beech Island crossing, as far down as where the wreck occurred; and Leach emphasized his statement by saying (folio 121), . . . "it is a very abrupt curve in there. Q. How far is it? A. A mile and a half or three-quarters from the crossing." This did not correspond with Mr. Dobson's testimony, who was summoned by both sides, and he testified before Mr. Randall did, for Mr. Dobson had testified (folio 59): "I think it had been retied and it was a plumb straight track."

It is true that Mr. Dobson was recalled (folio 646), in an effort to wipe out the testimony of the section man who said the tools were found the second day of the wreck, by reasserting Dobson's recollection that they were found the afternoon of the day of the wreck. In an effort to demolish Randall's testimony that he saw section hands working in the vicinity of the wreck, Dobson also said that you could

not see "any ways near" the point of the wreck, on account of a "bluff and curve." But on cross examination the witness said there was nothing to obstruct the view down the track for about a mile from Beech Island back to the wreck. After all it seems the witness had accurately described the track when he first testified that it was a "plumb straight" track where the wreck occurred, and was evidently at a point where the vision was not involved by a curve. At least the jury were justified in accepting Randall's statement and Dobson's statement as first made, that it was a "plumb straight" track. For Mr. Davies, who came to help the railroad with his testimony, and who has a track connecting with the C. & W. C. track, after saying it was impossible to see the point where the wreck was, modified his statement by saying that you could not see in a quarter of a mile of it (folio 217). Asked then pointedly "Then to see anybody, he would have to be how far from the wreck? A. Over a half mile *or further,*" which was a very indefinite statement. But the section man and his witness said that he was working in an entirely different section of the road to that between Beech Island crossing and the wreck, and it was peculiarly within the province of the railroad company to know where they were working and to know when they worked there last and it was their duty to have done so and to have truly testified where they were working. In this conflict the jury had the right to accept the testimony of Randall that he saw them working in the vicinity of the wreck, fixing the rail. And the fact that Randall's testimony was true is corroborated by the inspector's testimony which will later be referred to, who said that the work Leach was doing the day before the wreck (the only question is one of locating him), was "lining and gauging" (folio 189); hence, when Randall, the first witness to say what Leach was doing, said that Leach appeared to be "working like fixing a rail" Randall certainly was describing what the supervisor of the road said he was actually doing, namely, "lining and gauging."

Leach said he had been over the road a dozen times but

did not remember whether he sent a track walker the day or the day before or when to inspect the track. He said some of the ties were new and some were old (folio 156) and that neither the old nor the new had any marks of bars on them before the wreck. The jury would not accept this theory, because they knew a man who was "lining and gauging" must have of necessity pulled spikes from the ties and changed the width between the two rails and the pulling of spikes necessarily caused the dents on the ties; and if while working on the rail at the point of the wreck on the late afternoon of the day before, Leach and his hands neglected to put back the spikes taken from two or three ties and failed to bolt one end of the angle irons, **it was perfectly reasonable that the trains passing over this weak place would jar the rail out of position until the flange of the wheel struck it and threw the train from the rail,** for Dobson said there was a dent in the rail to the center and Davies said the dent was slightly to the left of the center, using this language "At what point did it hit it? A. It did not hit it plumb. Q. Which side did it hit it on? A. On the left side." It can be seen that a train wrecker would not have so slightly thrown the rail out of alignment as to make it so that the flange would hit it slightly to the left of the center; but **if the section master failed to put back a few spikes and two or three bolts, the trains constantly running over the road would throw the track out of alignment so that one of the flanges would strike it, and this is what was done in this case, for the engine had practically passed over the joint that was out of alignment, and the flange that struck the end of the rail dented it slightly to the left of the center of the rail; and the jury could infer from the neatness with which the bolts and spikes were removed and piled that they were removed and piled by section men and that section men on leaving the scene of the wreck, where they had been working, simply neglected to put**

**these two or three spikes back in and neglected to bolt the angle irons on the Ellenton end of the rail.** Peculiarly a question of circumstantial evidence for the jury.

Jack Stevens was a member of the section master's crew and he testified "The day just before the wreck, as near as I can come at it, we were between the six and seven mile posts working." "Q. How far is that away from where the wreck occurred? A. About two miles is as close as I can come to it. Q. You and your crew had not done any work down where this wreck occurred at that time? A. No, sir. Q. You know about how long it had been since you had done any work there? A. No, sir" (folios 165-167). On cross-examination this witness said "Q. Who told you that you were at the six or seven mile post the day before the wreck happened? A. We stopped that morning I remember to get a push car and go there. Q. You talked to somebody about the case this morning, didn't you? A. No, sir. Q. Yesterday? A. No, sir; I am just trying to think it up. Q. This is the first time you testified about this case, I believe? A. Yes, sir. Q. Then you have talked with somebody about this case since 1921? A. Not as I know of (folios 173-174)."

It will be noted that another witness working with the crew puts the section master's operations the day before two miles away and has no recollection even when work was done in the vicinity of the wreck, although Mr. Dobson says they were there the week before.

T. H. Dean, road master, says that the section men were working the day before the wreck, "lining and gauging," between the six and seven mile posts, and that they had not been working down where the wreck occurred (folio 188); and he describes the pulling of the spikes as being pulled out along the whole rail (folio 194); which is a contradiction of Davies and Dobson, who described the pulling of two or three ties only, and then on both sides of the rail as to one tie only; and if the whole rail had been pulled and the rail put out of position no part of the engine would have crossed over it. And again this same witness said (folio

201), that the fastenings had all been pulled and that a rail had been taken out (folios 200-201).

Davies, a defense witness, says (folio 212) "Only two or three of the bolts had been withdrawn, and that (folio 244) the flange of the wheel struck the end of the rail on the left side of the center of the rail that the engine was approaching and that the rail varied from one to three inches out of alignment (folio 242) and that it was only four or five feet down the rail to where the spikes were in the ties (folio 240); and that the train jumped the track because it hit the end of the rail pointing towards Augusta and that the rail pointing off from Augusta was pushed in (folio 232); but **the jury had the right to say that the flange striking the end of the rail to the left of the center or even at the center showed that the rail was slightly out of alignment, which would naturally come about by reason of the bolts and spikes being left out on the afternoon before and the trains jarring that joint out of alignment, for witness Davies himself says (folio 244) "it did not hit it plumb." "Q. Which side did it hit it on? A. On the left side." The jury deduced from this testimony that if the flange hit the rail to the left of the center, knowing the width of a rail, it would be impossible to say that the track was out of alignment enough to call it from one to three inches and that it was not enough out of alignment to say that a train wrecker would leave it that way believing he would wreck a train; but that the crew had left it while "lining and gauging" the afternoon before without putting back all the bolts in the angle irons and without putting all the spikes in two or three of the ties.** Mr. Davies' version was as follows: "What caused it? (folios 228-229). Several spikes were drawn up and the rail was pushed in and then driven down in a new place. Q. How many of them? A. Not as many as should have been to hold a rail accurately. Q. How many were there? A. I know there was one. Q. How many more? A. I don't know how many

there were, but I know there was one. Q. How many more? A. There may have been two or three. I know there was one because I saw it. Q. How far was it driven in from the place where it was pulled out before? A. I would say an inch or so. Q. The track was pulled in an inch or so? A. Yes, sir. Q. And the spike was driven down to hold it? A. Yes, sir. Q. Where was the hammer? A. I don't know. I did not see anyone drive it. Q. Did you see one or more spikes? A. I saw one I am certain."

Mr. Davies may have been ever so honest in his desire to show that someone had thrown the rail out of alignment purposely to wreck a train; but **this testimony certainly shows that the spikes had been drawn or at least one, and had been driven in again, and that it was not out of alignment one or more inches, for the flange of the wheel struck the track to the left of the center thereof,** and if Mr. Leach was "lining and gauging" as was testified to by the road master and if Randall properly located him, **it is more reasonable to believe that in "lining and gauging," which necessarily required the drawing of spikes and the replacing of rails, the section master forgot some spikes and forgot some bolts and that the rail got far enough out of alignment to strike it to the left of the center thereof** (folio 244). The tools found are completely discredited because they were not found until the day after the wreck after crowds had walked about over the grounds.

A number of witnesses were put up by the defense to show that numerous trains had passed over the defective track, on which to base the argument that the defect was made after the last train preceding the one wrecked, nearly all of the trains passing going towards Augusta. Not only would it be natural for trains going into Augusta to press their way through the track that was too narrow without the flange striking anything to make it jump the track; but it would be perfectly natural for it to do so. We are mindful of the testimony that a train had passed going out of

Augusta and in the same direction as the wrecked train was going; but **as was testified by Mr. Johnson (folio 692) "It would be possible for a whole train to pass over it before it got out for a train to hit it."** Mr. Johnson was a defendant's witness, who qualified as an expert. He said (folio 691): "Q. Have you not seen many wrecks where the engine and car get over it? A. Yes, sir; and it is possible that the train and car or engine and car went over this place because it traveled 190 feet. The engine frame is rigid and that holds it up. Q. As long as it stays in place it will set there, but if in the shaping of the road that rail works out a little into the middle of the road where a flange of the wheel hits it to the left of the center, that will cause a derailment? A. Yes, sir; a track out of alignment will cause a derailment."

This same witness said (folio 693) that the force of the impact would carry the rail forward.

It will be noted that after dinner (folio 696) this same witness was recalled to the stand and in an effort to explain his testimony, said it would not be possible for a whole train to have crossed a rail exactly in alignment, but loosened, as was evidenced by the examination made by witness. This testimony seems in a measure to contradict what the witness had said before dinner. When this witness was on the stand again (folio 698) he said there was a slight abrasion on the rail and that: "It might have been a wheel or something about the wrecked part of the cars," that caused the abrasion; and the witness then said that the rail was so badly bent that it was not "replaced" in the track, which contradicted the testimony given by the conductor. The Court will bear in mind the testimony the witness, Johnson, was giving after dinner was in an effort to explain what he had said before dinner, to wit (folio 692): Q. "It would be possible for a whole train to pass over it before it got out for *a train* to hit it? A. Yes, sir." We submit that the jury accepted this view of it; to wit that the previous train

going over this same track, going in the same direction, passed over the joint before the rail worked out, and that the train wrecked (a part of which had passed over the joint) struck the end of the worked-out rail, slightly to the left of the center thereof, with the flange on one of the wheels and **it will be remembered that the witness, Davies, said that he saw at least one spike that had been drawn and re-driven, which would support the view that it would be perfectly easy for the rail to stay in alignment for even more than one train to pass over it before the vibration of the passing train jarred the rail out of alignment; and the same witness, Mr. Davies, said that there were only two or three spikes out of the rail.**

It will be noted that other witnesses put up by the defense denied that the rail causing the trouble had been drawn in and that the spikes had been drawn and driven down in another place, and some of them denied that the spikes were drawn as section hands would draw them; but a **reading of the testimony will show that the spikes were drawn with the same instruments, according to both plaintiff and defense theories, that a section hand would draw them with; that the wrench and crowbar would be used by either a train wrecker or a section hand and a justifiable inference that the jury could draw from the testimony was that the "lining and gauging" that the section foreman was doing the day before was where the defective rail was; and they rejected the idea that the section house of the Southern Railway had been entered by a train wrecker, several miles away, by boring holes in the side of the wall until the boards could be taken out and the crowbar and the wrench be taken several miles to the particular point where the wreck was, for the purpose of wrecking the train, without a motive; and the idea that the tracks could be discovered leading away from the place of the wreck in the afternoon where numerous ones had**

**walked all over the ground the morning before, was rejected by the jury** and it is respectfully submitted that the facts in the case warranted the jury in doing so.

Some of the witnesses said that the spikes were taken up all the way down the rail and some of them said that two rails had been tampered with and some of them said that the rail had been set out six or eight inches. It is but common sense that an engineer would have observed a rail taken clean out and would have made some effort to stop his train before plunging into a place of this character; whereas the evidence shows that a part of the train passed over the defective joint before the flange on one of the wheels struck the end of the rail and derailed the train.

**The case was one, turning purely upon circumstantial evidence, and the circumstances pointed so strongly to the theory of the plaintiff that the jury found their verdict upon the evidence and it was peculiarly a question for a jury.**

Considerable effort was made to dispose of the witness Randall who was going to his hay field. The principal idea was to show that he could not see to the point where he said the section man was working at the track. Dobson was recalled to say (folio 648) "One crossing at Beech Island could not see the point of the wreck or near it?" His answer was; "No, sir; they could not see any ways near it. Q. Why? A. On account of a bluff and curve." On cross examination this witness said: "Q. For about a mile from Beech Island back to the wreck is a straight track? A. Yes, sir; it looks to be nearly a mile. Q. There is nothing to obstruct the view down the track? A. No, sir; it would be open for practically a mile" (folio 652).

In the testimony of the witness Craddock (folio 493) the record shows: "Q. Can you tell the distance from the point of the wreck to Beech Island station by your mile post or anything else on there? A. Yes, sir; I can give it to you accurately. Q. What is it? A. Approximately one and three-tenths miles. Q. From the place of the wreck to Beech

Island station as shown on here? A. Yes, sir. Q. As we go on I see a curve in here, what is that? A. A five degree curve to the left. Q. Proceeding East? A. Yes, sir" (folio 495).

Although this witness said (folio 499) that it was a physical impossibility to see to the point of the wreck with the five degree curve at the point indicated, yet, on cross examination (folio 506) he said "Q. How far is that bank dug out from the railroad track? A. In some places I guess it is 300 feet, but you cannot see the gravel pit from Beech Island station. Q. I am not talking about that—a man can see about a mile from Beech Island down this way? A. Yes, sir. Q. And none of this part of the road is between the six and seven mile post? A. Not a bit. Q. Because that is on the other side towards Ellenton? A. Yes, sir."

This testimony is significant because it shows that you can see a mile back towards the wreck; that is within three-tenths of a mile of the very point where the wreck occurred, considering the case from the defense's point of view; yet the section man said that he was between the six and seven mile post on the day before the wreck and that place is on the other side towards Ellenton. Granting for the sake of argument that Randall's claim is incorrect (though this was question for the jury), yet according to the defense's own testimony one could see from Beech Island to within three-tenths of a mile of where the wreck was, and if Randall could see the section man within three-tenths of a mile of where the wreck was, and if he was fixing the track (lining and gauging as testified to by the defense's witnesses), he was certainly where he said he was not working, and he was certainly doing work that he could travel three-tenths of a mile to do in one afternoon; because lining and gauging is nothing more than relocating rails to make them properly lined and gauged; indeed, such work may not be necessary within a space of three-tenths of a mile.

The testimony clearly shows that the Southern Railway tools were not found until twelve or thirty-six hours after

the wreck, for the section master said (folio 140) "Oh, that was a day or two, afterwards," when referring to the finding of the tools, and when found, they were found to be of a larger size than the tools used to remove bolts of the size used by the C. & W. C. (folios 66, 635), and yet there is no evidence in this case to show that there was a tendency to round the corners of the nuts taken off the bolts, as would happen if a wrench should be used larger than the head of the bolt, notwithstanding the fact that the section master said (folio 144), in referring to the nuts and bolts ". . . . but the morning of the wreck they were laying at the joint on the inside of the rail there"; and there was no effort made on the part of the defendant to show that these nuts and tools were removed by a wrench too large to remove them neatly.

And there was nothing found with these tools that could drive spikes, yet two of the witnesses, Davies and Dobson, said that spikes had been drawn and re-driven; and not only did the supervisor of construction say (folio 189) that the section master was on the day before the wreck lining and gauging; but the section hand said (folio 180), in referring to the car the day before the wreck, "We were working and using it to haul ties."

"Q. You left that car out there?

"A. When we had a lot of ties to pull, we did."

And the section master, although he said ties were generally burned, on cross-examination admitted that he had picked out good ties and carried them to another point and admitted that such re-used ties were in the vicinity of the wreck (folio 157).

"Q. When you were working the track, didn't you take the spikes out of an old tie?

A. When you go to pull it out.

Q. And you put the old tie back in again?

A. No, sir; not those.

Q. I asked if you had ever done that?

"A. Yes, sir; I have picked out the good ties and carried them to another point.

"Q. You make a positive statement to these gentlemen that not a single one of the ties in the neighborhood of the wreck had a heel mark on it before the wreck?

"A. No, sir.

"Q. And every tie in one hundred yards of there had no heel mark on it?

"A. No, sir; I said at the wreck."

It will be seen from this line of testimony that the section master was simply denying that the tie right at the wreck had ever been removed, while he admitted that he had re-used ties at other points.

While the expressions are used by the witnesses throughout the case that the rail had been "tampered with" or that the spikes had been "pulled" etc., yet respondent respectfully submits that the testimony shows clearly that the instruments used to pull spikes and take nuts off the bolts are made by the same machinery, though different sizes, and when boiled down to its final analysis, whether removed by a wrecker or by a section hand, the same instruments would be used to perform the task; but the section master denied that he was in that section the day before and said he was two miles away in the opposite direction from the Beech Island crossing and that he had not worked up there in sixty days and Mr. Dobson said he had worked up there the week before; and, in re-aligning and gauging, he would perform the identical service of taking up and driving down spikes and re-setting rails and would have a hammer with him; while amongst the tools found there was no hammer nor other instrument to drive with and plaintiff's intestate had died in the service of his master and the death resulted from a rail that was out of alignment, and in this case, as in many others of its kind, circumstantial evidence must be resorted to to find the cause of the derailment.

A jury certainly could not say they would pass up the duty of solving the evidence. They did not say that it was

the act of a criminal; for they evidently did not accept the theory that tracks were visible from the wreck to where these tools were found, even in the afternoon of the day of the wreck, after so many people had passed over the grounds during the day. They had the right to reject the argument that some criminal would carry the tools to the particular place where the train was wrecked, and then carry them away and hide them, for no reason whatever. The jury had the right to believe that the tools were put there after the wreck, for where was the hammer to drive with? The jury had the right to infer that the section master, re-aligning and gauging, had been in the vicinity of the wreck the afternoon before and not two miles away as he said he was and that he actually re-aligned and gauged the identical spot where the derailment occurred, because it had all the ear marks of a rail having been re-set, and the jury had the right to believe that one or two trains would have passed over it from Augusta and that there would be no difficulty in many trains passing over the place going to Augusta and that the vibration caused the rail to draw in slightly so that the flange of the wheel would hit slightly to the left of the center thereof, which showed that it was only slightly out of alignment when it was struck, and that it was due to the negligence in properly spiking and bolting the rail the afternoon before, when the section crew was there re-aligning and gauging; the spikes and nuts found were neatly drawn and neatly piled, as a section master would do; and not as a train wrecker would do with a wrench too large to fit nuts properly, and who was taking off nuts and drawing spikes in the dead hours of the night.

## APPLICATION OF LAW POINTS IN CONSIDERATION OF TESTIMONY

The rule prevailing in State practice, reiterated in *Dutton v. R. Co.*, 104 S. C., 16, 30 (judgment affirmed in memo-

randum opinion, 245 U. S., 637) is that the evidence required to carry the case to the jury is **"such evidence as is sufficient to warrant a reasonable jury in rendering a verdict upon it."**

And, in this connection, the Court further said:

"We have frequently held that a non-suit should be granted or the verdict directed, unless the evidence is sufficient to warrant a reasonable jury in basing a verdict upon it, and we have held, in cases too numerous to mention, that when the evidence is susceptible of only one reasonable inference, the Court must declare what that inference is, as matter of law."

It is clear from the foregoing that the rule of State practice governing the submission of cases to the jury is not at all different from the Federal practice rule declared in *Gunning v. Cooley*, 281 U. S., 90, 94 (cited in petitioner's brief), to the effect "that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

It is clear also from the opinion of the State Supreme Court in the instant case that, in sustaining the judgment found against defendant, effect was given to the foregoing consideration; for, in the majority opinion, it is pointed out that the testimony concerning the conditions found to exist at the place of the accident justify the inference "that the rail in question was left unbolted and unspiked by the section-hands and not caused and occasioned by some outside person as contended by the defendant." In stating this conclusion, the opinion further comments:

**"It is hard to conceive of a person bent on mischief taking time enough to arrange the bolts and spikes in the order in which they were found and to have done the other acts in the manner described by witnesses. On the other hand it may be reasonably inferred from**

**all of the facts and circumstances that the section hands left the work at that place unfinished the evening before the wreck occurred. According to our view this was an issue for the jury."**

In *Gunning v. Cooley, supra* (cited and strongly relied upon in petitioner's brief) judgment for plaintiff was sustained on circumstantial evidence, notwithstanding direct evidence given by defendant in his effort to exculpate himself from the charge made against him; and, more directly applicable to such conclusion than the statement of general principles quoted in petitioner's brief, we find three other propositions of law (which are just as pertinent to the case at bar) stated (at page 94) as follows:

**"Issues that depend on the credibility of witnesses and the effect or weight of evidence are to be decided by the jury.**

**"In determining a motion of either party for a peremptory instruction, the Court assumes that the evidence for the opposing party proves all that it reasonably may be found to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them.**

**"Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."**

In our discussion and analysis of the testimony, in argument before the State Supreme Court as well as in the argument which is made here, we recognize the rule stated in *Chesapeake & O. R. Co. v. Martin*, 283 U. S., 209, 214, that the Court "is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying countervailing inferences or suggesting doubt as to the truth of his statement, unless the evi-

dence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable." In commenting upon the testimony given by the employee of defendant, the Court (283 U. S., 215) pointed out that it was reasonable upon its face and in accordance with probability; that it was wholly unchallenged by other evidence or circumstances; and that it was so completely corroborated by the undisputed facts as to put it beyond the reach of a fair doubt. In this connection (at page 216), it is said:

"A reading of it (the testimony of the employee) discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there was nothing in the record which reflects unfavorably upon his credibility."

**The instant case is distinguishable because of circumstances in the case, justifying the inference by the jury, that section hands, working on the track, had failed to properly spike and bolt one of the rails, and that the work improperly done was the cause of the derailment. There is the testimony of Randall, a witness not interested in the cause, that section hands were working "like fixing a rail" near the place of the derailment on the afternoon before (folios 83-84 and 89-90). There is the testimony of Leach, section foreman, who must be regarded as an interested witness, that the section crew had a handcar which was used in their work (folio 177). There is the testimony of Dean, road master, who must also be regarded as an interested witness, that the track hands were "lining and gauging," although he says that they were doing this work between the six and seven mile post while the wreck occurred between the four and five mile post. It was clearly a matter for the jury to pass upon and**

**weigh the probability of such testimony. It was entirely reasonable for the jury to infer that the defect in the track grew out of the re-alignment of a rail that was not properly gauged or fastened to the ties, and the inference was justified that the work had been left incomplete when the track hands quit work for the day. The inference was also justified that the western end of the rail (the end pointing towards Augusta) was so drawn in in the resetting of the same, that because of certain spikes left out, the motion of the train caused the re-set end of the rail to draw in to the center of the road enough for a flange on the wheel to hit it, causing the derailment.**

The fact that a number of trains passed over the rail, going to Augusta, is an inconclusive circumstance, because the end of the rail did not set in to strike trains going in this direction; the fact that a train or two had passed over the rail, going in the same direction as the wrecked train is explained by the testimony of Johnson, qualified as an expert witness for defendant, who, under cross-examination, testified that it is possible that the engine and car went over this place before the rail had worked out of alignment because it traveled 190 ft. (folios 690, 691).

**"Q. It would be possible for a whole train to pass over it before it got out for a train to hit it?**

**"A. Yes, sir."**

**The facts are in the evidence to sustain the inference that the rail was worked out of alignment by the strain put upon it by the passing train; and while no one saw the occurrence, yet the mute testimony is conclusive; for if the rail had been lying 6 or 8 inches off, it is probable that the engineer would have seen it; and certainly the flange of the wheel would not have struck it so as to make the dent in the rail described by Dobson (folio 45) and Davies (folio 225); and the train would in all probability have been derailed instantly; but it is an uncontroverted fact of the case**

that the engine and a part of the train passed over the rail before it had worked far enough out of alignment to cause the derailment.

In the case of *Sanders v. C. & W. C. R. Co.*, 147 S. C., 487, 493, it was said: "Some act of negligence as alleged must be proven, but this negligence may be shown by a number of facts and circumstances, which, taken together, establish the act of negligence charged."

In the case of *Dantzler v. Cox*, 75 S. C., 334, 339, it was said: "While there was no direct and positive testimony sustaining the defenses set up in the answer, still there were facts and circumstances, from which the jury might properly have drawn the inference, in favor of said allegations. The rule is thus stated in *Railroad v. Partlow*, 14 Rich., 237: 'It may be that no one of the facts would of itself warrant the inference and yet, when taken together, they may produce belief, which is the object of all evidence.' In 1 Greenl. Ev., Sec. 51a, it is said: 'It is not necessary that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue or constitutes a link in the chain of proof; although alone it might not justify a verdict in accordance with it. All the circumstances mentioned in this ground may be regarded as links in the chain of proof, from which the jury might deduce the inference of the defendant's privity and direction in the acts of trespass. This is usually the case where an issue depends on circumstantial evidence. Among the circumstances was the fact that, having the opportunity to take the stand and exculpate himself, the defendant declined to do so.'"

It will be seen from an examination of the record that defendant's witnesses contradicted themselves in trying to explain the condition of the rails, bolts, angle irons, and ties. They contradicted themselves as to when and where the section hands had been working before the wreck, as will be seen by reading the testimony of Leach and Dobson. (Dobson was summoned by defendant, as well as by plaintiff, and was recalled and placed on the stand as defendant's

witness). They contradicted themselves as to whether the rail was pushed out or not, as to whether it was straight or bent, as to whether it was dented or not. Their testimony concerning the tools (which, under their theory, were used in removing the bolts and spikes) also presents many elements of improbability. The theory they present is that the train wrecker broke into the Southern Railway tool house several miles away; took out a heavy wrench and heavier clawbar; carried the wrench and clawbar for miles; used them to remove the bolts from the angle plates and to pull spikes from the cross ties; then threw the tools into a near-by gravel pit—where they were found the afternoon of the day of the wreck or a day or two after (the afternoon, as Dobson said [folios 46–48 and folio 645]; on the second day after the wreck [folios 141, 159], as Leach, the section foreman said), although many people had trodden over the ground before the discovery of the tracks leading to the tools (folios 61, 62 and folio 77). The wrench, as Dobson testified, "was larger than the bolts" (folio 66); and Gannt, section foreman of the Southern Railway, when asked whether the wrench would fit the bolts loosely or snugly, said, **"It would fit but not snugly. It would cut the corners some"** (folio 635).

The record will, however, be searched in vain for any evidence to show that the nuts which had been taken off showed any damage on their corners from the use of a wrench which was too large. The wrench, although taken later to the Augusta office of the C. & W. C. R. Co. (folio 620), was not produced at the trial. As to the nuts and bolts, Leach, the section foreman of the C. & W. C. R. Co., testified that the nuts and bolts were not there two days afterwards and that "they might have been buried there somewhere, as we had made repairs. But the morning of the wreck they were laying at the joint on the inside of the rail there" (folio 144). At any event the bolts and nuts were not produced at the trial although they had admittedly been in defendant's possession and although it must have been

obvious that a test (which could easily have been made by the jury) would afford demonstrative evidence of the strongest kind to show whether the nuts had, in fact, been taken off by the loosely-fitting Southern Railway wrench which, as testified by Gannt, "would cut the corners some."

As was stated in *Anderson v. Hampton & Branchville Railroad Co.*, 134 S. C., 185: "And not only should questions of fact be submitted to the jury when they are in dispute; but also the matter is proper for the jury to pass upon, when the question is as to inferences to be drawn from such facts, after the facts have been determined." The question was solely one of whether or not there was sufficient evidence to go to the jury.

A case closely in point is *Southern Railway Company (Carolina Division), v. Bennett, Admr.*, 233 U. S., 80, 85, affirming 98 S. C., 42, where the defendant was killed by the falling of his engine through a burning trestle bridge, and there was evidence tending to show that the trestle was more or less rotten and that the fire was caused by the dropping of coals from an earlier train. An instruction was given by the trial Court to the effect that, if a servant is injured through defective instrumentalities, it is *prima facie* evidence of the master's negligence and that the master "assumes the burden" of showing that he exercised due care in furnishing them. Commenting on this instruction, the opinion, delivered by Mr. Justice Holmes, said:

"Of course the burden of proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition but merely expressed in an untechnical way that **if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden.** . . . The Judge did not say that the fall of the engine was enough, but that proof of a defect in appliances which the company was bound to use care to keep in order and which usually would be in order if due care was taken, was *prima*

*facie* evidence of neglect. **The instruction concerned conditions . . . about which the company had better means of information than the plaintiff, and concerning which it offered precise evidence, which, however, did not satisfy the jury."**

In *San Juan Light Co. v. Requena,* 224 U. S., 90, 98, it was held that the instruction given to the jury on the presumption of negligence arising from the fact of the occurrence which "devolved" on defendant electric company "to show that the surplus and dangerous current that came over the wires did not occur from any negligent act on its part"—when read in the light of what preceded and followed it and of the case before the jury—"rightly declared and applied the doctrine of *res ipsa loquitur,* which is, when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." In stating that there was no error in the application of the doctrine in the particular instance, the opinion pointed out:

"The deceased was without fault. . . . Had its (the defendant's), wires and converters been in proper condition, the excessive and dangerous current would not have been communicated to its secondary wire and the injury would not have occurred. These wires and converters were exclusively under its control, and it was charged with the continuing duty of taking reasonable precautions, proportioned to the danger to be apprehended, to maintain them in proper condition. In the ordinary or usual course of things, the injury would not have occurred had that duty been performed. Not only did the injury occur, but immediately thereafter both converters were found to be out of order. . . . **These circumstances pointed so persuasively to negligence on its part that it was not too much to**

**call upon it for an explanation. Of course, if the cause of the injury was one which it could not have foreseen and guarded against, it was not culpable, but in the absence of that or some other explanation there was enough to justify the jury in finding it culpable."**

In *Spokane & Inland R. Co. v. Campbell,* 241 U. S., 497, 505, an action was brought under the Federal Employers' Liability Act by an engineer of an interstate electric road, for injuries resulting from a collision. Defective air brake equipment was alleged as causing the accident. The evidence was circumstantial. Plaintiff's testimony was that when he applied the emergency, 600 feet or more from the place where the collision occurred, the brakes took hold and then leaked off so as to release the brakes. There was also testimony that the train could have been stopped inside of 300 feet, if the brakes had been in proper order. Against this testimony was the testimony of defendant that the air brakes had been inspected and found in perfect order immediately before the train was taken out on the trip. It was held that the case was properly submitted to the jury; and judgment for plaintiff was affirmed. In discussing the inferences to be drawn from the testimony, Mr. Justice Pitney commented: **"The air brake equipment was wrecked in the collision so that there was no explanation of the cause of its failure to operate properly; but it was a reasonable inference that there was some defect or want of repair in the valves or packing."**

In *Travelers' Insurance Co. v. McConkey,* 127 U. S., 661, the question arose, under the provisions in an insurance policy, whether the death of the deceased was the result of suicide or was caused from injuries (or an injury) effected through external, violent and accidental means within the intended meaning of the contract and conditions expressed in the policy. In considering this question, Mr. Justice Harlan, delivering the opinion of the Court, said:

"The facts were all before the jury as to the movements of the insured on the evening of his death, and as to the

condition of his body and clothes when he was found dead, at a late hour of the night, upon the floor of his office. While it was not to be presumed, as a matter of law, that the deceased took his own life, or that he was murdered, the jury were at liberty to draw such inferences in respect to the cause of death as, under the settled rules of evidence, the facts and circumstances justified."

In *Sweeney v. Erving*, 228 U. S., 233, the Court held that the rule of *res ipsa loquitur* does not have the effect of shifting the burden of proof, but that there is a class of cases where the circumstances of the occurrence that have caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the parties charged with care in the premises, the thing that happened amiss would not have happened. In this connection (at page 240), it was said:

"In our opinion, *res ipsa loquitur* means that **the facts of the occurrence warrant the inference of negligence,** not that they compel such an inference; **that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking,** but it is evidence to be weighed, not necessarily to be accepted as sufficient; **that they call for explanation or rebuttal,** not necessarily that they require it; **that they make a case to be decided by the jury,** not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. **When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."**

Two of the cases above referred to—*Southern R. Co. (Carolina Division), v. Bennett;* and *Spokane, etc., R. Co. v. Campbell*—were master and servant cases arising under the Federal Employers' Liability Act. *Sweeney v. Erving* (not a master and servant case) cites with approval cases from the North Carolina Supreme Court; and, in the decisions of that Court, we find a long line of collision and derailment cases where the presumption of negligence arising

from the occurrence is recognized as a substantial factor of proof to make out plaintiff's case.

In *Wright v. R. Co.*, 127 N. C., 225, 229, where plaintiff's intestate, a brakeman in the employ of defendant company, was killed in a railroad wreck occasioned by derailment, it was said:

"The Court has held in *Kinney v. Railroad Co.*, 122 N. C., at page 964, where the plaintiff was an engineer injured in a collision: **'If the doctrine of res ipsa loquitur ever applies, it should certainly do so in such a case.'** In a still later case (*Marcom v. Railroad Co.*, 126 N. C., 200), also by a unanimous Court, it is held: 'Where the derailment of the engine resulted in the death of the intestate, a fireman in the employ of the defendant company, a *prima facie* case of negligence is to be inferred, and the burden is thrown upon the defendant to disprove negligence on its part.' **It is true that a common carrier is not an insurer of the safety of an employe, neither does it insure the safety of a passenger; but when there is a collision, or a derailment, and in like cases, the presumption of negligence arises. It is a rule of evidence, which, in no wise, springs out of the contract for carriage, but which arises from the fact that such things do not ordinarily happen unless there is negligence on the part of the carrier, and therefore it arises equally, whether the injured party is a passenger, or an employe."**

In *Winslow v. Norfolk Hardwood Co.*, 147 N. C., 275, 276, plaintiff, who was an employee of the defendant and rightfully on one of the trains operated by it, was injured by a derailment of the train. The effect of the derailment, as evidence of negligence, was discussed in the opinion in the following language:

"The burden of the issue does not shift, but the burden of proof may shift from one party to the other, depending upon the state of the evidence. **When the plaintiff introduces testimony in a case of this kind to the effect that the injury to him was caused by the derailment of a**

**train, it is sufficient to carry the case to the jury; but the burden of the issue remains with the plaintiff, though the burden of proof may shift to the defendant in the sense that, if he fails to explain the derailment by proof in the case, either his own or that of the plaintiff, he takes the chance of an adverse verdict, for then the jury may properly conclude that the plaintiff has established the affirmation of the issue as to negligence by the greater weight of the testimony.** But the defendant is not required to overcome the case of the plaintiff by a preponderance of the evidence."

In *Duvall v. Receivers, Seaboard Air Line Railway,* 152 N. C., 524 (an action by an employee of defendant arising under the Federal Employers' Liability Act) the State Court held that a presumption of defendant railroad company's negligence was raised from the fact that the injury complained of was received in a head-on collision. The case being carried on writ of error to the U. S. Supreme Court, the writ was dismissed. *Seaboard Air Line R. Co. v. Duvall,* 225 U. S., 477.

See, also, *Stewart v. Railroad,* 137 N. C., 687 (engineer killed in head-on collision); *Wallace v. Power Co.,* 176 N. C., 558 (employee injured by derailment); *Craig, Admr. v. Suncrest Lumber Co.,* 185 N. C., 560 (engineer killed by the engine being derailed and turning over); *Chicago, etc., R. Co., v. Irving* (C. C. A., 9th Circuit), 234 Fed., 562 (passenger killed in railroad wreck caused by derailment of the engine and part of the train; **the defense of the railroad company being, in substance, that it was not responsible for the derailment of its train, but that such derailment was caused by the removal of spikes and angle bars and the displacement of the rail at the point of derailment, and was the work of trespassers or others unknown to it who designed to wreck the train. Held that it was for the jury to say whether the testimony offered by defendant rebutted the prima facie case of the plaintiff**); *Manning v. Chicago, etc., R. Co.,*

135 Minn., 229 (locomotive fireman injured by derailment of engine going 35 miles an hour around a curve); *Connor v. Atchison, etc., R. Co.*, 189 Cal., 1 (the unexplained falling of a railroad bridge causing injury to a trainman); *The Columbia*, 25 Fed. (2d), 516, affirmed (C. C. A., 2nd Circuit), 25 Fed. (2d), 518 (death of ferry boat engineer resulting from explosion of gas bag used in lighting system); *American Glycerine Co. v. Brown* (C. C. A., 5th Circuit), 30 Fed. (2d), 316 (explosion of cans of nitroglycerine causing truck driver's death); *Chesapeake & O. R. Co. v. Smith* (C. C. A., 6th Circuit), 42 Fed. (2d), 111 (break in train line causing injury to brakeman); *Chesapeake & O. R. Co., v. Wells* (C. C. A., 6th Circuit), 49 Fed. (2d), 251 (railroad engineer suing for injuries as a result of explosion of locomotive boiler); *Baltimore, etc., R. Co. v. Hill*, 84 Ind. App., 354, certiorari denied, 273 U. S., 738 (action for death of fireman killed when locomotive left track without apparent cause). **Doctrine of res ipsa loquitur held applicable, throwing burden on defendant to go on with evidence and explain cause of accident to escape inference of negligence arising from circumstances disclosed by evidence);** *Central R. Co. v. Pelusa* (C. C. A., 2nd Circuit), 286 F., 661 (employee operating a crane on a dock killed by the breaking of a boom), *certiorari* denied, 261 U. S., 613.

It has been truly remarked (the truth of the remark being obvious, although it appears in the dissenting opinion of Chief Justice Clark in the *Winslow case*, 147 N. C., 275, 280), that, in derailment cases "it would be difficult in behalf of the deceased or dismembered victim to prove negligence as an independent fact. . . . When he has shown that the injury was caused by derailment or collision he has usually done all that he can do."

This is the exact situation of the parties in the present case. The wreck occurred approximately four miles from Augusta about 3:10 A. M. (folio 285). Receiving the report of the accident soon after it happened, railroad officials

(the superintendent, road master, and wrecking foreman of the C. & W. C. R. Co.) were at the scene of the wreck by 5:30 A. M. (folios 422, 429); and the facts of the derailment were all open to their investigation, before the wreckage had been cleared up. The deceased engineer lived at Florence, S. C., which was almost the width of the state from the place of the derailment; and his family living with him was composed of his mother, over seventy years old at the time, and his three small children, who were respectively 9, 11, and 14 years of age, the testimony being also that two of the children were feeble-minded. What more could these —the old mother and the small children—do than to show that the death of the bread winner of the family had been caused by the derailment?

It is also to be noted in this connection that there is a state statutory requirement (Sec. 4923, Code of 1922) to the effect that notice of railroad accidents is required to be given immediately to the railroad commissioners, by telegraph, telephone, or such other means as may be quickest under the circumstances, at the same time that notice is given the officials of the railroad on which the accident occurred, and that the railroad company shall furnish immediate transportation to the Commissioners to the place of accident. It does not appear from the testimony offered on behalf of defendant whether notice was given to the State Railroad Commission; but if the notice had been given and the representative of the Commission had been present and his findings had corroborated the theory of defendant as to the accident, it may be fairly assumed that testimony to that effect would have been given in the case.

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The burden of petitioner's argument is that the faulty alignment of the rail was due to a criminal act; and that the realm of conjecture must be entered to find the cause. The wreck was certainly due to improper setting of a rail that caused a car wheel to strike it and derail the train. Who did it? Was a wrench and claw bar used to take off nuts, draw

spikes **and re-drive** spikes? Did not the jury have the right to express its disbelief that tracks would be seen two days after wreck when so many people had walked over the ground? It was unquestionably the duty of the company to furnish a safe track. Then when we prove it was unsafe and its unsafeness was due to improper repairs, does it excuse as a matter of law to say certain tools were found nearby? We say repairs were made there. They say they were two miles away from there. The jury believed they were **not** two miles away from there. The road master's merely saying he was not there is not conclusive, and if the jury believed that he was there, it was no inference without foundation to say he improperly reset the rail and failed to sufficiently spike it; and if he failed to do that, the company was liable; for that is the work he was doing wherever he was. If the section hands were there when the road master said they were not, the inference is justified that they were "lining and gauging"; and it was an improper "lining and gauging," whether by the section hands or someone else, that caused the wreck; and the circumstances are evidentiary to show that the negligent "lining and gauging" done by the section hands caused the wreck. The evidence from all the circumstances brought out by the testimony was for the jury; and, as was said in *Castle v. Bullard*, 23 How. U. S., 172, 187:

**"Circumstances altogether inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."**

The right of the jury to view with suspicion the testimony given concerning the tools, and to reject the theory that the Southern Railway wrench was used in taking the nuts off the bolts which held the rail in place, finds abundant corroboration in Federal decisions. The wrench was not produced at the trial. The bolts and nuts were not produced at the trial. It was in the power of defendant to produce them. And if they had been so produced, there would have been demonstrative evidence, of unimpeachable character,

that might well have resolved any doubt in the minds of the jury as to whether the wrench found at the wreck had been used in the removal of the bolts. Failure to produce exhibits that would have been of such vital importance as aids to the ascertainment of the truth was, in itself, sufficient to justify the jury in disbelief of the explanation offered by defendant as to the cause of the wreck.

In the case of *Clifton v. United States,* 4 How., 242, 248, it is said:

"It is well observed by Mr. Evans (2 Evans Pothier, 149), in substance, that if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the Court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects all secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and that it may well be presumed, if the more perfect exposition had been given, it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal."

In *The Frances case,* 8 Cranch, 348, 353, the Court, commenting on the fact that certain letters, which appeared material to the case had not been produced, questioned:

"Why are not these letters produced? It is impossible not to perceive their necessity. . . . Why is no one of these letters produced? It is impossible to account for the fact that no one of these letters is an exhibit in the cause."

In *Brig Struggle v. United States,* 9 Cranch, 71, 74, the declaration with reference to a penal statute is made:

" . . . and if in the course of such vindication he shall pass in silence or leave unexplained circumstances which militate strongly against the integrity of the transaction, he cannot complain if the Court shall lay hold of those circumstances as reasons for adjudging him **in delicto.**"

Even more strongly expressive than the foregoing is the declaration in *Runkle v. Burnham,* 153 U. S., 216, 225, where the Court, speaking through Mr. Justice White, re-

iterates the doctrine of *Clifton v. United States,* that **"the production of weaker evidence when the stronger might be produced lays the producer open to the suspicion that the stronger evidence would have been to his prejudice."**

## CONCLUSION

The occurrence of the derailment and the surrounding circumstances permitted an inference of culpability on the part of the defendant; made out plaintiff's *prima facie* case; and presented a question of fact for the defendant to meet with an explanation. Although the plaintiff's case rested wholly on proof of the derailment, the surrounding circumstances and the absence of an explanation, he would at the close of his case, have been entitled to go to the jury on the question of fact thus presented, if no further evidence had been offered. *Plumb v. Richmond Light and Railroad Company,* 233 N. Y., 285. Nor does the testimony of defendant, offered in explanation of the derailment, make out a case coming within the principle of *Chesapeake, etc., R. R. Company,* where, in discussing the testimony given by defendant's witness, the opinion (285 U. S., at page 216) points out that such testimony was not controverted by proof or circumstance, directly or inferentially. There are in the present case, many grounds, as we have endeavored to show in the foregoing discussion for inferences contrary to the theory of defendant and suggesting doubt as to its testimony. The case is one, therefore, which falls directly within the rule declared in *Gunning v. Cooley* (281 U. S., 94), that **"issues that depend on the credibility of witnesses and the effect or weight of evidence are to be decided by the jury."**

It is therefore respectfully submitted that the petition for a writ of *certiorari* should be denied.

JOHN F. WILLIAMS,
R. E. WHITING,
*Counsel for Respondent.*

STATE OF SOUTH CAROLINA,
County of Richland. } ss.

R. E. Whiting, who being duly sworn makes oath and says: That he mailed by United States registered mail copies of the foregoing brief in opposition to petition for writ of *certiorari*, to counsel of record for appellant on the 19th day of November, 1931.

R. E. WHITING.

*Sworn* to and *subscribed* before
me this 19th day of November, 1931.

.....

*Notary Public for South Carolina,*
*My Commission Expires at the Pleasure of the Governor.*

# SUPREME COURT OF THE UNITED STATES.

No. 453.—October Term, 1931.

Atlantic Coast Line Railroad Company, Petitioner, *vs.* Hannah R. Temple, Administratrix of the Estate of Joseph R. Temple, deceased.

On Writ of Certiorari to the Supreme Court of the State of South Carolina.

[March 14, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Judgment recovered by plaintiff (respondent here), in an action under the Federal Employers' Liability Act for the death of her intestate, was affirmed by the Supreme Court of the State. This Court granted a writ of certiorari. The question is whether there was sufficient evidence of negligence on the part of defendant, to justify the submission of the case to the jury.

Plaintiff's intestate was employed by defendant as locomotive engineer of a train running between Augusta, Georgia, and Sumter, South Carolina, in the early morning of May 20, 1921. At a point near Augusta, and about one and three-tenths miles north of a station called Beech Island, the train was derailed, the engine overturned, and the engineer killed. The accident took place on the line of the Charleston & Western Carolina Railway Company over which defendant, the Atlantic Coast Line, had trackage rights, and the negligence charged was that the employees of the former company working on the roadbed had failed properly to spike and bolt one of the rails, causing it to spread. There were two witnesses for plaintiff. One of these, who lived near Beech Island station, testified that, while driving across the railroad at that station on the afternoon before the accident, he had seen section hands working on the railroad, apparently fixing a rail, at a point between that station and a gravel pit which was not far from the place of the accident. He 'did not pay much attention'; he 'just saw them working'. It was conclusively shown by the evidence

that there was a curve on the track a little less than a mile above Beech Island station and that by reason of the contour of the land, with an intervening bluff, it was impossible for one at the crossing at the station to see the place where the wreck occurred or within at least a quarter of a mile of it. The witness knew nothing of the wreck and there was no evidence that the men whom he described had been working at the place of the accident or had any connection with the cause of the derailment. The other witness for the plaintiff had visited the scene shortly after the wreck occurred. He testified that the rail was 'torn up', that spikes and bolts were 'laying on the cross ties', that three or four ties were 'taken loose', that there was no doubt the spikes had been 'pulled', that 'it was not a matter of fixing the track and leaving them out', that the bolts and angle bars 'had been removed certain', that there was a dent about the middle of the rail indicating that the rail 'had been pushed in', and that one end of the rail had been 'pulled in' and 'spiked in from the outside' making the track 'too narrow' so that a train coming from Augusta would be derailed. Thinking that 'it looked like it had been wrecked and there might be some tools', the witness made a search, and following tracks leading to a gravel pit about fifty or sixty feet away, he found behind some bushes a crowbar used for pulling spikes and a wrench for loosening bolts; that these tools had identification marks showing that they belonged to the Southern Railway Company whose line was five or six miles distant.

The testimony for defendant gave a more extended description of the conditions at the place of the wreck, confirming the testimony as to the pulling out of the spikes, the removal of the bolts and angle bar, and the displacement of the rail. One of the witnesses, a planter living at Beech Island, testified that, on examining the place of the wreck on the same morning, he found that several spikes had been drawn, that the rail had been 'set in' and 'spiked down on the outside',—that 'the rail was pushed in and then driven down in new place'. Another witness, a passenger on the wrecked train and also an inspector and special investigator for the Interstate Commerce Commission, who had made an immediate examination of the track, testified that, at the point of derailment,

one rail was out of place and that the angle bars had been removed from each end of the rail; that the bolts and nuts indicated that they had been removed by some [illegible] purpose and the condition of the bolts showed that they had been stripped in any way; that there was no indication that the condition of the track had caused the rail to spread; that an inspection of the locomotive and cars showed no defect that would contribute in any way to the derailment; that the road apart from the wreck was in 'good condition'; that the ties, rails and angle bars were those of 'the regular and proper strength'; that the inspection in that territory compared favorably with the inspection of railroads in general; that it appeared that 'the spikes had been pulled directly upward' and that 'had they been crushed out upon the flooring of the rail, it would naturally have made a slanting pull or splintered the tie, but they were pulled out straight.' The testimony of the road-master was that he had made a careful inspection of the track in question as late as five-thirty in the afternoon before the accident. The section foreman testified that the track was in good condition, that the section men had not worked at the place of the wreck for several weeks, that during the week of the accident they had not been at work within a mile and a half of that place, and that on the previous day they were working about two miles to the south; that they had no tools branded with the name of the Southern Railway Company. The section foreman of the Southern Railway Company testified that on the morning of the accident he had missed a 'claw bar and a wrench' which he had put in the tool house the evening before and that he found that the tool house had been broken into. There was evidence that these were the tools found near the wreck. Several trains passed over the track in question between the afternoon before and the time of the wreck and the engineers testified that they observed nothing unusual. Two trains passd on the way to Augusta only about one hour and a half before the accident; the point is made that there was testimony that the position and condition of the rail were such that this might be possible despite the displacement of the rail, although a train running in the opposite direction (like the one in question) after the rail had worked out of alignment, would be derailed. But the argument with respect to the time when the displacement might have been effected, which in any event could

not have been very long before the accident, and the contention based on the position of the nuts and bolts, are unavailing in view of the lack of evidence tending to show that the defendant was in any way responsible for the condition which caused the derailment.

There are many details which it is unnecessary to review as they do not affect the essential question. It is sufficient to say that upon a careful examination of the entire record we are unable to discover any basis for a finding of negligence on the part of defendant. The motion for the direction of a verdict in its favor should have been granted. *Atlantic Coast Line R. R. Co.* v. *Davis*, 279 U. S. 34; *Gunning* v. *Cooley*, 281 U. S. 90; *Atchison, Topeka & Santa Fe Rwy. Co.* v. *Saxon*, decided February 15, 1932.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

END OF CASE